MOTOR CARRIER ACT OF 1980

HEARING

BEFORE THE

SUBCOMMITTEE ON SURFACE TRANSPORTATION

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

OVERSIGHT OF THE MOTOR CARRIER ACT OF 1980

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MOTOR CARRIER ACT OF 1980

TUESDAY, DECEMBER 14, 1982

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
SUBCOMMITTEE ON SURFACE TRANSPORTATION,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:08 a.m., in room 235, Russell Senate Office Building, Hon. John C. Danforth (chairman of the subcommittee) presiding.

Staff members assigned to this hearing: Cynthia M. Douglass, staff counsel and Will K. Ris, minority staff counsel.

OPENING STATEMENT BY SENATOR DANFORTH

Senator DANFORTH. Over the past year or so a number of people in the trucking industry or related to it in one way or another have expressed concern about the health of the industry and they have spoken of the effect of the recession on trucking. They have also spoken about the effect of deregulation on the trucking industry.

Therefore, the purpose of this hearing is to examine the Motor Carrier Act of 1980 and the effect that that has had on the industry and to determine if there are any steps that should be taken with respect to that act to improve the health of trucking in this country.

The first witness is Charles Swinburn. Mr. Swinburn is the Deputy Assistant Secretary for Policy and International Affairs of the Department of Transportation.

STATEMENT OF CHARLES SWINBURN, DEPUTY ASSISTANT SECRETARY FOR POLICY AND INTERNATIONAL AFFAIRS, DEPARTMENT OF TRANSPORTATION, ACCOMPANIED BY DR. EDWARD H. RASTATTER, CHIEF, REGULATORY POLICY DIVISION

Mr. SWINBURN. Mr. Chairman, Senator Packwood, thank you for inviting us here today to discuss the administration's views on economic regulation of the motor carrier of property industry. With me I have Dr. Ed Rastatter, Chief of our Regulatory Policy Division.

Understanding that your schedules are very busy these days, I am prepared, if you like, to present a briefer version of my statement.

Senator DANFORTH. Yes; and for all the witnesses, I think that the staff has spoken with all of the witnesses about the time that you will have, because we just cannot have a fulsome time for everybody. But statements will be included in the record in full.

Mr. SWINBURN. Thank you, sir.

The Motor Carrier Act of 1980 has now been in effect for almost 2½ years. Not all of the reforms contained in the act, most notably elimination of antitrust immunity for single-line rates, have been fully implemented. However, it is our view that reform is working well, despite a prolonged downturn in the economy.

Much of the evidence I would point to is well known to you. There is greater competition and there are expanded price and service options and independent pricing actions on the part of carriers. The reforms undertaken to date are helping to insure that shippers can obtain the types of transportation services they want at competitive cost-based prices, as well as promoting greater efficiency in motor carrier operations.

Clearly, the condition of the economy has had a negative impact on the trucking industry, just as it has had on other industries. In fact, it is our opinion, based on the evidence we have seen, that the recession, not regulatory reform, is the primary cause of reduced profits and increased unemployment in trucking.

I might depart from my prepared statement for a moment, Mr. Chairman, to say that those words written in black and white might appear a little cavalier. I should emphasize that Secretary Lewis is quite concerned about the health of the transportation industry and the health of the trucking industry in the midst of this prolonged recession, and the words on this paper should not be taken to mean that he is not.

In the rest of my oral statement I would like to address two issues of major importance to today's hearing—carrier pricing practices and the availability of motor carrier service. With respect to the first issue, let me address directly one of the major concerns that has been raised by opponents of reform and say that although we have heard a number of allegations of predatory pricing by motor carriers, we have seen no persuasive evidence that it exists.

It is not by itself predatory for an efficient carrier to undercut its higher cost rival's price, even if that rival thereby suffers economic harm. Reform was intended to bring the benefits of efficiency and competition to society as a whole, not to protect one carrier from another.

Further—and as we have often stated—the economic characteristics of the trucking industry are not conducive to predation. Because there are no high regulatory or economic barriers to entry, a carrier cannot expect to establish a monopoly on a route and recoup today's losses with tomorrow's monopoly profits. It is simply too easy for another carrier to enter that market and set competitive prices to preclude those monopoly profits.

Turning to service availability, the fears of the opponents of reform that chaos and severe loss of service to small communities would occur have clearly not been realized. There is ample evidence available. First, witnesses at the recent House Public Works Committee oversight hearing testified that satisfactory motor carrier service, including both small shipments and truckload service, continues to be available to shippers and that the massive cessation of service predicted by some has not occurred.

Second, the recently completed ICC study of small community service concluded that shippers in small and isolated communities have not been harmed by the act. On the contrary, where changes have occurred, improvement in service was reported much more often than service deterioration.

Third, Professor Kidder of Syracuse University is in the middle of a 3-year study for the Department, investigating changes in small community trucking service in six States. Professor Kidder's studies show that the shippers have noticed little change in shipping conditions. In fact, there are more, rather than fewer, carriers competing for rural business and while freight rates have risen moderately in these areas, shippers believe that the increases are associated with general inflation rather than regulatory reform.

Few respondents have been critical of any of the reform legislation, and some have credited improvements to it.

To wrap it up, Mr. Chairman, I am pleased to report that the evidence we have seen demonstrates that the Motor Carrier Act of 1980 is contributing to the creation of a more competitive, more efficient trucking industry—an industry whose carriers are becoming more sensitive to the needs of shippers for a wider variety of pricing and service options. Moreover, the massive cessation of service predicted by opponents of reform has not occurred.

I might note before concluding, Mr. Chairman, that a lot of research has gone into some of the conclusions we have quoted and a lot of research has been done by various bodies around the country. Rather than cite a lot of statistics, I have directed my staff to package copies of all that research and send them up to the committee in the very near future—perhaps within a week—for your records.

That concludes my prepared remarks, Mr. Chairman.

Senator DANFORTH. Yes. I look forward to seeing the statistics because I think that your conclusions are highly optimistic, I would say. If they are correct, they do not agree with many comments that I have heard.

For example, do the statistics include figures on bankruptcies in trucking firms over the last couple of years?

Mr. SWINBURN. Yes, sir. We will provide you with statistics on bankruptcies. I believe we have a complete set up through the end of 1981. One of the analyses we have done which I think others have not done is to compare bankruptcies in intercity trucking with bankruptcies in local trucking, the latter not having been affected by the Motor Carrier Act.

We find on a statistical basis that there is not a significant difference in the trend or growth in bankruptcies in the one versus the other.

Senator DANFORTH. How about unemployment in the industry?

Mr. SWINBURN. Unemployment statistics we have on the industry I believe included the third quarter of this year. Dr. Rastatter can cite some for you, if you would like.

We do not find any significant deviations in the employment trend in this industry versus other industries in the economy, nor in comparison to prior recessions in this industry, although I must note that this recession has gone on longer than others the industry has had to live through for a long time, and one would expect a more serious unemployment problem after this prolonged time.

Senator **Danforth**. Your view is the problems with the industry reflect generally economic conditions and that there is really no added burden on the industry caused by deregulation?

Mr. **Swinburn**. I think that would be too simplistic for me to say, Mr. Chairman. We think that the majority of the problems faced by the industry are due to the recession—traffic is off in tremendous amounts—but there is also no doubt that the Motor Carrier Act created a more competitive world in the trucking industry and management has to be more efficient to survive today than it did prior to the Motor Carrier Act.

The protections given by regulation have largely been lifted and some of the bankruptcies that are occurring probably are occurring because the management has not had that protection and has not been able to compete successfully.

Senator **Danforth**. One thought could be that the recession is the most significant problem that the industry faces, but at a time of recession, at a time when the position of the industry is precarious is the worst time to carry out deregulation, that it tends to just push it further to the edge at a time when it is tottering.

In any event, you do not share that view?

Mr. **Swinburn**. I share some of that view, Mr. Chairman. Incrementally I think that the increase in competition accentuates the effect of the recession. It makes it more difficult for managements to survive.

I certainly would have preferred—I think we all would have preferred—not to have gone through this recession and to be able to test the effects of deregulation in a nonrecessionary environment. That is true in trucking and it is true in airlines.

It would be naive of me to not admit that there are some greater difficulties created for managements out there because of the greater degree of competition.

Senator **Danforth**. Do you have any statistics indicating a difference in effect of deregulation on small versus large truckers?

Mr. **Swinburn**. We do not, Mr. Chairman. I have spoken to your staff about this and we have initiated a study very recently, and we hope to see the results in perhaps May or June of next year, of what is going on in the small trucking universe. It is a universe for which very few statistics are available, and largely our first step is to attempt to amass descriptive statistics, if you will—who are the truckers, what is their size, the nature of their business, what has been the level of new entrants, exit, bankruptcy, et cetera—but we do not presently have that information available.

Senator **Danforth**. Do you have any suspicions?

Dr. **Rastatter**. I would guess that they are not in very good financial condition either, Mr. Chairman.

Senator **Danforth**. But that is no differential between large and small?

Mr. **Swinburn**. We just do not have the evidence upon which to base a conclusion as to whether there is a difference.

Let me back off from that. Clearly, if you look just at the strata of carriers within the top 100 for which fairly recent financial information is available, the profits that are being earned by the carriers within that top 100 are being earned by the larger ones in the group and, in fact, a handful account for the majority of the profits.

One might extrapolate from that and say that in the universe of smaller carriers there are greater financial difficulties, but it is not an extrapolation I would make with great confidence.

Senator **Danforth**. Does the administration support any modification of deregulation, any change in statutes? Do you think we should make any kind of midcourse correction?

Mr. **Swinburn**. We have been evaluating that question for several months within the Department and with people on the Vice President's Task Force for Regulatory Relief. We have decided that we would not go backward, if you will, on deregulation. We have not come to definitive conclusions on whether we should go forward and further deregulate the industry.

It may well be the case that the industry is suffering now from being in between—that is, from still being shackled with some minor regulatory requirements while being exposed to greater degrees of competition because of freer entry. It is our hope, before we propose any specifics in the next session, to discuss this with you, with members on the other side of the Congress, with the industry, and try to develop a consensus on what should be done, although I should note that it is the administration's disposition and Secretary Lewis' disposition to seek the freer market solution.

Senator **Danforth**. Does the Department have a good open system of communication with the industry and with those who work in the industry with respect to the effect of deregulation?

Mr. **Swinburn**. We have had conversations with some individual truckers on the effects of deregulation. We hope to have more. We have not sat down and had a good long discussion with the ATA on the effects of deregulation. We would hope to do that before presenting any further proposals.

Most of our conversations with the ATA recently have been dominated by another subject—the gas tax.

Senator **Danforth**. Well, you know, here is an industry, speaking of that, which is, I believe, having some serious trouble and the recession is obviously a part of it. At the time that the recession is hitting, deregulation also is hitting, and then, as they are reeling from the recession and deregulation, we are bopping them over the head with gasoline tax and the accompanying excise tax.

Do you think that we are overdoing it, or is there some way we can let them up for air, do you think, other than—I know you are going to say—the lengths and widths and so forth? But do you think that we have been a little bit cavalier maybe in dispatching this industry to a whole new world?

Mr. **Swinburn**. I think that the action taken by the Senate Finance Committee in (a) moderating the peak level of charges for larger trucks, and (b)—and more significantly, I think—postponing the imposition of that heavy duty use tax until January 1 of 1984 and then in essence phasing that in in three steps is a recognition of that problem. And that is a significant modification, I think, to what we propose.

There is one characteristic of this industry that has historically been true, and that is when the economy starts moving upward this industry moves upward very rapidly. The assets are, if you will, rather fungible. They can be put to work quickly. The network is in place—the physical network—upon which they operate.

I believe that once the economy comes back that this industry will quickly return to healthy profits. That, combined with the size and weight relief promised in the bill, and the postponement of the heavy duty use tax, I think directly addresses that concern about hitting the industry with a triple whammy, and I think properly so.

We have not yet, as you know, unfortunately, endorsed that 3-year phase in, but the Secretary has all along indicated a wish to phase in the tax in recognition of the industry's plight.

Senator **Danforth**. Senator Packwood.

The **Chairman**. No questions.

Senator **Danforth**. Senator Pressler.

Senator **Pressler**. Thank you, Mr. Chairman.

I think it is very appropriate that we are holding an oversight hearing regarding this regulation of motor carriers. So often in the Congress, in my service in the House and Senate, there is a lot of news when a bill passes, and I want to compliment the chairman for holding oversight hearings, because the real work of Congress is looking to these agencies sometimes and seeing what the results are of the legislation we have passed.

There is very little news coverage of oversight hearings. They are not the most exciting things in the world, but I think we almost need an oversight Congress to review and improve what we have done rather than passing new legislation.

I opposed the Motor Carrier Act when it passed. I know the word "deregulation" sounds great, but, very frankly, it has hurt transportation in my State. I have been fighting to have the interests of rural and small town areas reviewed. Although there are many good reports on the word "deregulation" either of the trucking industry or the airline industry, when statistics are laid out they are usually, if you really look into it, not very favorable to a State such as South Dakota.

I know that I have heard that we have so much better airline service since deregulation, and in fact we have 40 percent less service in my State, and the commuter airlines have not sprung up out of the free enterprise system to fill the void.

The same thing has happened to some extent in the trucking industry. I have long been an advocate of the concept of the common carrier responsibility wherein if a trucking line or a railroad line is given some very rich routes, it also must take some poor routes or some routes that are not so lucrative. That is how our national transportation system was built, in my view.

If we abandon that I think it will have long-term effects on interstate and intrastate commerce. I think it is going to create great problems down the line that we have not yet seen and will start to see in the movement of agricultural goods and in the movement of other areas.

But I wanted to ask just a couple of brief questions, if I could here. I am going to have to leave some questions for the record, as I am chairing a subcommittee in another committee this morning. But do you have in the statistics that you mentioned—do you have any numbers on how comparative rail rates, especially in the movement of agricultural goods, have been affected in terms of truck rates?

I know that we are talking about truck rates here, but has there been a spinoff effect in any of your statistics regarding rail rates in the movement of agricultural goods?

Mr. SWINBURN. We do have statistics on those rates, Senator Pressler. I do not have them with me; I would have to provide them for the record.

Senator PRESSLER. That is fine; and I may have additional questions for the record.

Second of all, in terms of point-to-point movement of agricultural goods—and I would guess that maybe there has been an improvement—but in terms of nonpoint-to-point, what do your statistics show?

Mr. SWINBURN. Again, I would have to provide such statistics for the record, Senator. I would note that recently the Department of Agriculture released a fairly comprehensive study of the effect of rail deregulation on agricultural commodity movements which I think was fairly reassuring to the agricultural community, and they were unable to find any serious dislocations or serious problems.

We know the transportation staff at Agriculture quite well, and I would be happy to arrange a meeting with them, your folks, and our staff and go through the various statistics.

Senator PRESSLER. Yes. Kevin Schiefer of my staff and you could have a meeting and you could provide to the committee—I am not talking about a lot of statistics. We are interested in some very specific comparisons because I am very concerned that we are overlooking what is happening in some of the smaller towns and rural areas and in the movement of agricultural goods.

And increasingly, with the prospect of a cold storage pipeline, we are told, at least, that we are going to have to turn more and more to trucks to move that grain and other commodities, and we are following it very closely and that is an area of oversight that I want to have as a part of the record.

Mr. Chairman, I am going to be submitting questions this morning for the record, and many of them are statistics that my staff will work with the witnesses, and I do apologize. I have to chair a subcommittee elsewhere this morning. So I will be off now.

Senator DANFORTH. All right. Thank you.

Mr. Swinburn, one other point. That is that one of the leading critics of deregulation has been the Teamsters' Union. They, unfortunately, could not be present to testify, but they have submitted written testimony to the committee.

I wonder if I can give you a copy of their written testimony and ask you if the Department could respond to that testimony in writing for the committee. Could you do that?

Mr. SWINBURN. Yes, sir, we would be pleased to.

[The statement follows:]

STATEMENT OF CHARLES SWINBURN, DEPUTY ASSISTANT SECRETARY FOR POLICY AND INTERNATIONAL AFFAIRS, U.S. DEPARTMENT OF TRANSPORTATION

Mr. Chairman and members of the Committee, thank you for inviting the Department here today to discuss the Administration's views on economic regulation of the motor carrier of property industry.

The Motor Carrier Act of 1980 (MCA) has now been in effect for almost two and a half years. Before I begin the main body of my remarks, I would like to take a moment to commend the members of this Committee for their truly bi-partisan effort to bring about the enactment of this fine legislation. Many among you have made significant contributions to motor carrier reform and provided leadership in achieving passage of this pathbreaking piece of legislation.

Even though not all of the reforms contained in the Act—most notably elimination of antitrust immunity for single-line rates—have been fully implemented yet, and in spite of a prolonged downturn in the economy, I am pleased to convey our view that reform is working well.

I will not take this Committee's scarce time today to belabor the obvious: Motor carrier regulatory reform is accomplishing its intended goals of greater competition, expanded price and service options, and increased entry and independent pricing actions on the part of carriers. The reforms undertaken to date are helping to ensure that shippers can obtain the types of transportation services they want at competitive, cost-based prices, as well as promoting greater efficiency in motor carrier operations. Many diverse spokesmen have agreed that the trend toward relying more on the forces of the marketplace and less on regulation is an established fact—not a temporary anomaly.

Clearly, the condition of the economy has had a negative impact on the trucking industry—just as it has had on other industries. In fact, the evidence we have seen demonstrates that the recession—not regulatory reform—is the primary cause of reduced profits and increased unemployment in trucking. Although the process of reducing industry-wide excess capacity is harsh for those carriers whose capacity is judged to be superfluous by the impartial forces of the marketplace, we feel that the motor carrier industry of the future will be a stronger one when the economy rebounds and the present period of adjustment to reform is completed.

In the remainder of my remarks today, I would like to address two issues of major importance to today's hearing: carrier pricing practices and the availability of motor carrier service. With respect to the first issue, it is perhaps premature to be definitive. A recently-opened Interstate Commerce Commission proceeding is gathering information about carrier pricing practices from a broad spectrum of sources and should add substantially to our knowledge base. Nonetheless, I believe it would be appropriate to review conditions in today's marketplace and to address some of the concerns that have been raised by opponents of reform.

Although we have heard a number of unsubstantiated allegations of "predatory" pricing by motor carriers, we have seen no persuasive evidence that it exists. Since pre-Motor Carrier Act regulation permitted a number of inefficient carriers to survive, it is not surprising that some high-cost carriers are now finding it difficult to compete. However, the object of reform was to decrease—not increase—protective regulation. It is not by itself "predatory" for an efficient carrier to undercut its higher-cost rival's price, even if that rival thereby suffers economic harm. Reform is intended to bring the benefits of efficiency and competition to society as a whole, not to protect one carrier from another carrier.

One of the benefits of ratemaking flexibility is that it allows the marketplace to decide which carriers will survive and prosper in the long run. Let me assure you, Mr. Chairman, that the impartial forces of the marketplace do have one bias: they strongly prefer efficient, well-managed carriers that are responsive to the needs of shipppers!

While I am still on the topic of carrier pricing, I would like to mention a point that should be kept in mind while listening to today's witnesses. As we have often stated, the economic characteristics of the trucking industry are not conducive to predation. Because there are no high regulatory or economic barriers to entry, a carrier cannot expect to establish a monopoly on a route and recoup today's losses with tomorow's monopoly profits. It is simply too easy for another carrier to enter that market and set competitive prices to preclude those monopoly profits.

Offering new truckload service in a market takes little more than a truck. Providing new less-than-truckload service is a little more difficult, but expansion of such service by existing carriers is quite feasible.

In fact, many existing less-than-truckload carriers have expanded the geographic scope of their services even during the present recession. In addition, as the economy improves, some contract carriers may follow the example of Leaseway and establish new less-than-truckload service in innovative ways. Moreover, I would like to point out that the reforms of the Motor Carrier Act have also simplified entry for service to communities that have lost all rail or all regulated truck service. Finally, as is well known to members of this Committee, there is one common carrier—United Parcel Service—that has proven that even very small shipments can be carried profitably to every point in the United States.

Turning to service availability, the fears of the opponents of reform—that "chaos" and severe loss of service to small communities would occur—have clearly not been realized. There is ample evidence available. First, witnesses at the recent House Public Works Committee oversight hearing testified that satisfactory motor carrier service, including both small shipments and truckload service, continues to be available to shippers and that the massive cessation of service predicted by some has not occurred.

Second, the recently completed ICC study of small community service (mandated by Section 28 of the Motor Carrier Act) concluded that shippers in small and isolated communities have not been harmed by the Act. On the contrary, where changes did occur, improvement in service was reported much more often than service deterioration.

Third, Professor Kidder of Syracuse University is in the middle of a three-year study for the Department, investigating changes in small community trucking service since enactment of the Motor Carrier Act. Her statistics show that shippers in the six states studied (North Carolina, South Carolina, Georgia, Maine, New York, and Pennsylvania) have noticed little change in shipping conditions; that there are more, rather than fewer, carriers competing for rural business; and that, while freight rates have risen moderately in these areas, shippers perceive the increases to be associated with general inflation, rather than regulatory reform. Few respondents were critical of any of the reform legislation, and some credited improvements to it.

Finally, Mr. Chairman, during the House hearings last June, one witness testified that a number of towns in Colorado had lost all trucking service when a carrier closed down its terminals there. This was so far at variance with our other findings that we checked with a number of shippers in these towns and found that service was generally fine and had continued virtually uninterrupted in spite of the terminal closings. Moreover, a number of new carriers had moved in and begun serving the towns. Also, as in other towns we have surveyed over the years, grocery and hardware stores receive most of their wares by unregulated private carriage; and many other shippers use United Parcel Service whenever possible.

In summary, I am pleased to report that the evidence we have seen demonstrates that the Motor Carrier Act of 1980 is contributing to the creation of a more competitive, more efficient trucking industry—an industry whose carriers are becoming more sensitive to the needs of shippers for a wider variety of pricing and service options. Moreover, the massive cessation of service predicted by opponents of reform has *not* occurred. Even shippers in small or isolated communities continue to be satisfied with the motor carrier service they are receiving, and we remain confident that they—and other shippers—will continue to do so.

That concludes my prepared remarks, Mr. Chairman. I will now be glad to answer any questions you or other members of this Committee may have.

[The following information was subsequently received for the record:]

DOT RESPONSE TO TEAMSTER TESTIMONY ON OVERSIGHT OF THE MOTOR CARRIER ACT OF 1980

ICC ENTRY POLICY

The testimony alleges that the ICC has gone too far in easing entry—that it is engaged in a "rubber stamp" entry policy. We disagree. The Motor Carrier Act provides an eased entry standard, and we believe that the ICC has generally implemented this reform in accord with the spirit and letter of the Act.

Although it appears that a very high proportion of all applications for operating authority are approved (in whole or in part), this is not simply a matter of wielding a rubber stamp. Our understanding is that most applications for authority are still relatively narrow in scope, although perhaps somewhat less so than before the MCA. Research undertaken for the Department has shown that, prior to the MCA, applicants for new operating rights generally applied for what they thought the ICC would be willing to give them—not necessarily what authority they really wanted. To the extent that approval rates for operating authority merely reflect "asking for what you think they'll give you", high approval rates do not—in and of themselves—prove that entry standards are very loose. The same result could occur under a very tight entry standard, so long as applicants correctly perceived what the standard was.

Clearly, the interpertation in the testimony of "demonstrable need" is likely to differ from the interpretations of the ICC or the Department. Under the MCA, new entry is presumed to be in the public interest if the proposed services would "serve a useful public purpose". This could include offering new price or service options, as well as providing service when none (or too little) presently exists. If "demonstrable need" could be shown only where there was a clear lack of service, then the MCA entry test would provide no significant change from previous restrictive entry tests. The new entry standard is designed to allow shippers to get service that better meets their needs and, accordingly, should not be narrowly construed.

In one important entry area—the so-called "special circumstances" doctrine—ICC entry policy has not shown much signs of easing. Pending a decision in this proceeding, Ex Parte MC-156, the Commission still imposes tougher standards for truck operating authority on railroads and motor carriers affiliated with rail carriers than it imposes on other motor carriers.

COURT DECISIONS

The testimony implies that the federal appeals courts have overruled the ICC repeatly on a board spectrum of issues. Although there have been a substantial number of cases appealing ICC decisions, the scope of judicial reversal has been rather limited.

Chairman Taylor's testimony discusses 22 major cases involving motor carrier policy. Of these cases, five have not yet been decided. Of the remaining 17 matters, 11 cases saw no reversal of the ICC—the ICC's decisions were affirmed nine times, and two cases were dismissed. In six instances the ICC was either reversed or reversed in part and affirmed in part. The only major substantive reversals dealt with bulk commodities authority and the general principle that the ICC should not grant authority broader than sought by an applicant. Two others reversed minor portions of a rate bureau matter and a compensated intercorporate hauling matter.

On balance, it would appear that the ICC has won a lot more often than it has lost. In addition, some of the reversals of reversals in part have been further appealed, so no final verdict is yet available.

"RATE WARS"

It is alleged in the Teamster testimony that the ICC has not intervened while "rate wars" reduce industry excess capacity. Although we think that referring to vigorous price competition as "rate wars" is needlessly inflammatory language, the Department has a more serious criticism to make with regard to the allegation. If there is presently substantial excess capacity in the motor carrier industry, we see no reason why the ICC should artifically preserve all of such excess capacity. Using regulation to try to preserve all carriers—even the least efficient ones—would be inappropriate under the MCA and would do nothing to promote the goal of an efficient motor carrier industry. Shippers (and ultimately consumers) must pay for carrier inefficiency.

With respect to allegations of below-cost pricing, we have yet to see any systematic evidence that this problem exists. Costs differ substantially among individual carriers. In addition, the costs of a particular type of shipment (backhaul movements on an unbalanced traffic lane, for example) may be very low. A rate that seems too low to a highcost carrier may be quite reasonable for a lower-cost carrier. If witnesses believe that they can document shipments moving at rates below out-of-pocket costs, they should present such evidence. Price discounting occurs in most industries during economic downturns; it makes economic sense to cut prices to stay in business, as long as the revenues are at least sufficient to cover the out-of-pocket costs. We see no reason to preclude such price competition in trucking.

TEAMSTER UNEMPLOYMENT

The testimony reports that the Teamster's most recent survey indicates that more than 28 percent of its members working in general freight are on layoff, almost three times the level of unemployment reported in the general economy.

A June 1982 General Accounting Office report examined the methodology used by the Teamsters to estimate the layoff rate of its members. GAO concluded that "The union's job loss estimate in questionable because of deficiencies in the methodology of its study." Among the deficiencies cited were biases in the wording of a letter accompanying the survey forms; use of a "judgmental" sample (locals which were picked because the Teamsters felt they would cooperate) rather than a random sample; unverified data furnished by the locals surveyed; and projections from the general freight locals surveyed to the other types of carriers not surveyed. Most important however, was the fact that "on layoff" from a Teamster job is not the same measure as is commonly used to measure "unemployment". A Teamster "on layoff" could be working elsewhere in the trucking industry as an independent trucker or as a Teamster under a local agreement, or working elsewhere in the economy; "unemployed", for purposes of BLS statistics, means "out of work and actively looking for work".

The GAO also concluded that poor economic conditions, not regulatory reform, have been the likely cause of high unemployment in the trucking industry, and that declining Teamster membership is part of a long-term trend, although competition has accelerated that trend in the last two years. Finally we would point out that the most recent BLS estimate of unemployment among private wage and salary workers in the trucking services industry is 10.8 percent, which is virtually identical to the unemployment rate for the nation as a whole.

USDA REPORTS ON EXTENDED HOURS OF SERVICE

The testimony (p. 3) cites USDA reports that "almost 49% of owner operators are on the highway 15 hours or more per day. In addition, a recent truck stop survey found that owner-operators are substantially increasing driving time between rest and meal stops in an effort to stave off financial ruin." It also states (p. 7) that "The Department of Agriculture reported recently that owner-operators are driving on an average between 15 and 16 hours per day."

We believe the Teamster testimony misconstrues the information in the USDA report (attached), which was distributed by the California Department of Food and Agriculture in "Fruit and Vegetable Truck Rate Report," Vol. IV, No. 9, Thurs. March 4, 1982. This report cites the National Motor Transport Data Base Survey as reporting that, of 1,120 solo produce truckers interviewed in 1980 "37 percent reported that they drove as much as 15 to 16 hours per day." However the average driving time, during 1980, was 12.7 hrs pr day, not 15 to 16.

Even if the average hours driven figure were accurate and current (instead of two years old), a single observation proves nothing with respect to the effect of the MCA. Perhaps average hours driven were higher prior to 1980; perhaps they were the same. In addition, even if it were found that there had been a change in average hours driven, the question would remain as to what was the cause or causes of that change, e.g., the Motor Carrier Act, the economic downtrun, or other factors.

COMMON CARRIER OBLIGATION

The Teamster testimony alleges that, although the MCA was never meant to alter the "common carrier obligation", the ICC is granting authority to carriers which they do not request and cannot hope to serve. The testimony states that "the public is entitled to expect certificated carriers to provide responsive service to the full extent of their operating authorities."

The Department's views are laid out more fully in our comments in "Elimination of Certificates as the Measure of 'Holding Out'", Ex Parte No. MC-77 (Sub 3) (attached). In short, we believe that, in light of the clear Congressional intent behind the MCA to open up entry and remove operating restrictions impeding efficiency and competition, "a general policy construing a carrier's duty to serve as permissive, rather than mandatory, will in most, and possibly in all, instances best meet the transportation goals of the Act;" and that "the marketplace, rather than the Commission, should determine whether and when a motor carrier provides service".

The research on post-MCA service to shippers in small, rural communities—presumably the most vulnerable to abrogation of the common carrier obligation by carriers granted authority they "cannot hope to serve"—bears out our views extremely well. Service today appears to be as good, or better, than it was prior to the MCA.

In addition, the "old" common carrier obligation has never been proven to have cause service to be adequate. Rarely, if ever, has the Commission revoked a carrier's operating authority for failure to serve. Carriers have generally provided service because it was profitable to do so (see research cited in MC-77 comments), just as they would under a more permissive obligation to serve. We believe that a narrowly defined common carrier obligation is more likely to impede the provision of good service than to encourage it. Without the flexibility to engage in long-run business planning, carriers must continue to expand piecemeal, instead of applying for enough operating authority to meet their future needs.

10-POINT PROGRAM

Finally, the testimony lists ten actions the Teamsters believe are required to bring implementation of the MCA into full conformance with Congressional intent.

1. Requirements for entry.—The Department's general views concerning entry into the trusting industry and Science Coextensive with authority are more carefully spelled out under "ICC Entry Policy" and "Common Carrier Obligation," above. However, as to the Specific Teamster points concerning DOT's "safety and insurance regulations" and "fair wages and working conditions," we would add the following observations.

The Department's Bureau of Motor Carrier Safety is now working more closely with the ICC concerning the safety fitness of new carriers. However, there is sometimes a jurisdiction only over "carriers," and an applicant is not necessarily a "carrier" until its application is granted. As far as extensions of ICC authority, or new ICC authority for existing private carriers or entra-state waste transporters are concerned, BMCS will generally have safety fitness records to share with ICC. However, in the case of owner-operators applying for their first ICC authority, BMCS will generally have no records.

ICC's requirements under the National Transportation Policy is actually to "enable *efficient and well-managed carriers* to earn adequate profits, attract capital, and maintain fair wages and working condition's" (italics supplied). The NTP says nothing about inefficient or poorly managed carriers and, moreover, also lays out seven other requirements which ICC must balance against each other in carrying out the Institute Carriers Act. Among these, others are "allowing a variety of quality and price options to meet charging market demands." Overall, the intent of the MCA was to permit competitive forces to operate, rather than to continue to protect carriers from competition. We believe the ICC is making a good effort to balance these frequently conflicting objectives in ways that will promote a more efficient, more responsive motor carrier industry.

2. Service on demand.—The Department's views on the requirement that carriers provide service on demand, coextensive with their certificates, are discussed under "Common Carrier Obligations", above.

3. Enforcement of the common carrier obligation.—Again, the views of the Department on this issue are discussed under "Common Carrier Obligation," above. We believe that, if the Commission is to monitor service to small shippers and small communities, it would be more advisable to monitor "service" in general, not the operations of the individual carriers who have the authority to serve them. In many small towns we have surveyed over the years, as many as 15 or 20 carriers may be authorized to serve towns of less than 10,000 population. It clearly is not necessary to require them all to provide service, nor would it make economic or administrative sense to do so.

4. Minimum rates and non-discrimination.—Point (a) would prohibit rates below fully distributed motor carrier costs and would be tantamount to minimum rate regulation. This runs directly counter to the procompetitive thrust of the new National Transportation Policy. One of the major reasons for enactment of the MCA was the major savings it promised through its entry and ratemaking reforms; setting a fully distributed cost floor under rates would defeat one of the purposes of the Act. In addition, many practical considerations militate against efficient enforcement of such a proposal, including the fact that costs differ quite substantially among carriers, and the fact that different parties may also have different definitions of "fully distributed costs". We cannot concur in Teamster point (a).

Point (b) had to do with prohibiting discrimination between shippers in different areas. However, available data demonstrate that regulation was not effective in equalizing rates among shippers. We have submitted to the Committee a number of studies, concerning rate discrimination, providing such data (see Gary Fauth, "The Role of Commodity Value in Motor Carrier Class Rate Structures"; Thomas Corsi and Merrill Roberts, "Patterns of Discrimination Under Collective Motor Carrier Ratemaking"; and Russell Cherry, "Rate Effects of Collective Ratemaking and the Meaning of Concentration in Regulated Motor Carriage"). The Cherry study especially addresses the Teamster point of discrimination between shippers in different areas, as it show significant differences in rates charged across different rate bureaus, as well as within the same rate bureaus, and that rates to and from various sizes of communities differ, as well.

The Department strongly believes that free and open competition is the best insurance against abusive pricing practices.

5. Minimize disruption.—The Department agrees that the Motor Carrier Act directs the ICC to implement the Act with the least amount of disruption to the transportation system. However, this mandate should not be interpreted to mean that no change should occur. Other things being equal, the least disruptive means of achieving a particular goal should be chosen.

6. Owner-operator cost data.—We believe that information about the costs experienced by owner-operators would be useful to the Commission in its deliberations. However, we would strongly oppose the use of such data to promote minimum rate regulation for certificated carriers. The Motor Carrier Act was intended to encourage greater ratemaking flexibility and competition, not impede these goals.

Moreover, it is highly unlikely that the Commission could set minimum rates effectively for services provided by owner-operators under lease to certificated carriers. It is our understanding that the vast majority of leased owner-operators provide truckload services, rather than hauling for less-than-truckload carriers. It is generally agreed that markets for truckload services are intrinsically highly competitive (because entry if so easy). Consequently, attempts at strict regulation of the truckload sector of the trucking industry would be more likely to promote unauthorized hauling, rebates, reduced use of owner-operators, or other means of evading minimum owner-operator compensation standards than to create a tight "cartel".

7. Written contracts of haul.—Section 16 of the Motor Carrier Act of 1980 directed the ICC, in cooperation with the Secretary of Agriculture, to require by regulation, where appropriate, the use of written contracts of haul for the interstate movement of exempt agricultural commodities. After holding field hearings (in addition to requesting written public comments on an initial working paper), the ICC filed a report to the Congress on March 24, 1982. A copy of the ICC report is attached.

The report stated that both the Department of Agriculture and the ICC found that ". . . any mandatory contract of haul, even with a minimum of regulations to implement and enforce such contracts, would result in serious problems for the fresh fruit and vegetable industry without producing any meaningful benefits for the independent owner-operators."

Because most of the commodities involved are highly perishable, their transportation has many characteristics that differ from other types of motor carriage. For example, loads may be dispatched before a final destination is determined; in addition, the condition of the produce at destination may require substantial adjustment of the expected compensation to the trucker who hauled it. In general, there appear to be many issues that would be difficult to resolve under contracts written in advance of the loading of a pershable shipment.

8. Single source leasing.—In our comments filed with the ICC in Ex Parte MC-122 (Sub-No. 2), the Department supported allowing owner-operators (and other parties not possessing ICC operating authority) to lease themselves and their trucks to private carriers. We believe that the proposal is both legally feasible and highly desirable from a policy perspective. A copy of our comments is attached.

With respect to written contracts of haul for owner-operators providing such services to private carriers, we believe that written contracts might appropriately be used for long-term (30 days or more) leases. The Department has supported greater contractural protection for owner-operators leased to regulated carriers in its comments filed in the ICC's "truth in lending" proceeding, and it is very likely that we would support similar protections for owner-operators under lease to private carriers.

9. Truck safety and insurance.—The Department is addressing the issue of reasonable and equitable levels of financial responsibility for motor carriers of property. We recently submitted to Congress the report required by Section 30 of the Motor Carrier Act of 1980. The report includes recommendations for strengthening or existing authority (i.e., requiring coverage for foreign carriers to the same degree as U.S. carriers), as well as provisions designed to ease hardships (i.e., exemptions for certain small local operations). Given the evidence from the levels of insurance settlements in commercial vehicle collision cases, we do not believe that the cost of higher limits in all cases is justified by any indication of inadequacy of coverage. We are in the process of formulating a legislative proposal to amend Section 30 of the Act, as a follow up to the report to Congress, and will consider your views in this matter.

With respect to enforcement of the hours of service regulations, we are continuing our high level of compliance activity with out resources, as well as promoting higher levels of involvement by State counterpart agencies. In the last six months of 1981, Bureau of Motor Carrier Safety staff reviewed more than 600,000 drivers' logs for compliance with the hours of service limitations. The States have examined tens of thousands of additional logs at State roadside inspection points.

The Department does not report safety fitness determinations to the Interstate Commerce Commission on new entrants applying for ICC operating authority, because we have no safety jurisdiction over new for-hire entrants until they are issued authority and begin operations in interstate commerce. New entrants are required to aver that they know the requirements of the Federal Motor Carrier Safety Regulations as part of the ICC application process. The new entrants will be examined as they routinely come up for safety audit, unless specific adverse safety information comes to our attention, in which case assignments would be made to the filed staff.

Finally, the Department can take additional action against carriers with unsatisfactory safety records by means of a request to the ICC to suspend such a carrier's operating authority. The Federal Highway Administration has recently done so with respect to W. J. Digby, Inc.

10. Trucking industry employee protection.—The House Report on the MCA states, "the thrust of the elimination of jobs was dealt with by the creation of a list of available job openings to be supplied by regulated carriers to the Department of Labor. In addition, it is the intent of the Committee to conduct appropriate oversight hearings to ascertain the true impact of this bill on *industry employment* and what action, if appropriate, should be taken." (P. 4, emphasis supplied). Our views on industry employment are detailed above, and we believe the Committee has received sufficient information to determine that no further action is appropriate.

Senator DANFORTH. Thank you very much. Thank you, gentlemen.

The next witness is Reese Taylor, Chairman of the ICC.

Good morning, Mr. Chairman.

STATEMENT OF HON. REESE H. TAYLOR, JR., CHAIRMAN, INTERSTATE COMMERCE COMMISSION, ACCOMPANIED BY WARREN McFARLAND, DIRECTOR, OFFICE OF COMPLIANCE AND CONSUMER ASSISTANCE; RON YOUNG, DIRECTOR, BUREAU OF ACCOUNTS; JAN ROSENAK, LEGISLATIVE COUNSEL; AND WILLIAM SOUTHARD, DIRECTOR, OFFICE OF TRANSPORTATION ANALYSIS

Mr. TAYLOR. Good morning, Chairman Danforth, Senator Packwood, and Senator Pressler.

We have a fairly lengthy statement with some appendixes which we would like to submit for the record, and at this time I would like to just briefly go through a summary.

Before doing so, however, I would like to introduce the people that I brought with me this morning, Mr. Chairman. On my far left is Warren McFarland, Director of our Office of Compliance and Consumer Assistance. On my immediate left is Mr. Ron Young, who is Director of the Commission's Bureau of Accounts. On my immediate right is Jan Rosenak, the Commission's legislative counsel; and on my far right is Dr. William Southard, who is Director of our Office of Transportation Analysis.

Mr. Chairman and Senators, I want to thank you for the opportunity to appear today at the second annual Senate oversight hearing to present the views of the Commission with regard to the implementation and effects of the Motor Carrier Act of 1980. In addition to my statement, appendixes are included which provide additional information on Commission proceedings and also a package of reports issued since last year's oversight hearing either in response to congressional mandates under the act or as part of the Commission's ongoing effort to monitor the effects of the act.[1]

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[1] The material referred to has been retained in the committee files.

On June 18, 1981, at last year's Senate oversight hearing, the Commission testified that the motor carrier industry and the users of the services have responded favorably to the changes mandated by the Motor Carrier Act of 1980. I would like to reaffirm that view today.

In the second year of implementation, there is even more reason to believe that the significant reforms of the Motor Carrier Act—namely, eased entry, rate flexibility, and reduced antitrust immunity—have resulted in a more competitive environment in the trucking industry. This is not to say that, in so testifying, I am unaware of the serious financial difficulties experienced by many motor carriers.

Tonnage figures show a marked reduction in traffic for the industry which has had adverse effects on employment levels and carrier profits. It appears, however, that economic conditions, rather than regulatory reform, are at least a principal cause of the industry's declining financial performance.

Nevertheless, this situation is of great concern to the Commission, as evidenced by a recent conference held on October 5, 1982, at which we discussed the pricing practices of motor carriers, and decided to elicit comments from the public to gain a greater understanding of the current situation. Comments in that proceeding, entitled "Ex Parte No. MC-166," are due on January 15, 1983.

At this point I would like to highlight some of the indicators that have led me to conclude that the Motor Carrier Act reforms are indeed working.

First, since the effective date of the act, July 1, 1980, 13,806 new carriers have received authority from the Commission. Over 49,726 new certificates have been served during the same period. As expected, applications appear to have leveled off and are presently being filed at a rate of approximately 1,000 each month.

Second, overall shipper satisfaction with the level of service seems to remain high. Third, where small community service has changed, it has generally improved. Of the shippers surveyed in the Commission's nationwide small community survey, 9 to 20 percent said more service was available now than before the act; 77 to 90 percent said the availability of for-hire truck service was unchanged, and only 2 to 5 percent said less service was available now.

With respect to freight claims, 85 to 97 percent of those shippers surveyed indicated either that they had no claims or that there had been no changes in their ability to resolve claims. From 3 to 8 percent indicated more problems, and 1 to 9 percent indicated fewer problems with respect to claims.

Fourth, price innovation and independent ratemaking have continued to increase since passage of the act. In 1981, 115,085 independent rate actions were reported by major rate bureaus. The figure for fiscal year 1982 is 180,829.

Fifth, although initial results indicate that the new law had little positive impact on owner-operators, recent figures suggest that, increasingly, they are making use of the special provisions of the Motor Carrier Act to obtain their own operating authority. Just since June 1, 1982, 118 owner-operators have been granted certificates for operating authority.

Sixth and last, the Motor Carrier Act has significantly reduced the role of the Commission which has lessened our workload. As a result, authorized permanent full-time staffing at the Commission has decreased, and we have projected 1,425 for fiscal year 1983. This should net a considerable cost savings.

As discussed in more detail in the text of my statement, service levels remained good. While recent economic conditions may have had an impact, our experience to date has been favorable. Complaints continue at a low level. During the first 10 months of 1982, complaint levels concerning motor carriers of property ranged from a high of 1,348 in March to a low of 831 for October. This is substantially below the pre-Motor Carrier Act levels, when complaints were running as high as 2,000 per month and higher in many instances.

In fiscal year 1982, the total number of complaints against motor carriers of property declined more than 3,000 compared to the number received in fiscal year 1981.

Even more significant, however, in measuring the success of the act is the status of service to small communities, since this was the area that most people thought would suffer from regulatory reform. Congress mandated a thorough investigation by the Commission of service to small communities in section 28 of the Motor Carrier Act.

On September 1, 1982, the Commission submitted its report to the President and the Congress entitled "Small Community Service Study." The primary basis of the investigation was a shipper survey of approximately 1,200 randomly selected businesses in small communities throughout the United States.

As I mentioned, the results of this study indicate that while regulatory reform has caused no dramatic changes in small community rates and services, changes that did occur were generally favorable. In the vast majority of cases, shippers reported very little change in quality of service as measured by on-time performance, loss and damage claims, and availability.

In addition, where changes did occur, improvement in service was reported much more often than service deterioration. Complaints about trucking service in small communities have decreased significantly since passage of the Motor Carrier Act.

Finally, an examination of rates indicates that rates to and from small communities have increased less rapidly than rates to or from larger cities.

It is the conclusion of the study that the pre-Motor Carrier Act fears that carriers would abandon service to small communities have not materialized. In fact, the evidence suggests that small communities have actually benefited from this legislation.

Turning to industry financial performance, the decline in tonnage which resulted from the recession has created excess capacity in much of the motor carrier industry, without doubt. Consequently, there has been a decline in industry financial performance and an increase in the number of bankruptcies. Nevertheless, we agree with the conclusion of the GAO study dated June 11, 1982, that poor economic conditions, not regulatory reform, have been the likely cause of high unemployment in the trucking industry.

I might mention, though, that the GAO report does conclude that increased competition as a result of the Motor Carrier Act has accelerated a decline in Teamster Union representation in the trucking industry.

In considering the financial problems of the trucking industry, I would emphasize the recent high level of business failures in all sectors of the economy. According to Dun & Bradstreet, business failures are occurring this year at an annual rate of 80 per 10,000 companies, which is close to the level of business failures during the depression of the 1930's, which I think was 100 per 10,000 in 1933.

With regard to rates, there has been greater pricing innovation and more independent ratemaking since passage of the Motor Carrier Act. As I indicated earlier in my testimony, the number of independent actions is up, as is the number of motor carrier filings. Motor carrier filings for this fiscal year increased to 725,864, compared to 512,184 in fiscal year 1981, and 427,043 in fiscal year 1980.

The vast majority of filings are rate reductions. Thus it appears that the act has had its intended effect in increasing competition and providing greater ratemaking flexibility. The actions the Commission has taken in particular proceedings and the studies we have completed are discussed in detail in my complete statement and I will not take the time to repeat them now.

In conclusion, I would like to mention that the Commission is expressly considering further legislative recommendations regarding motor carriers. The legislative package was sent up here earlier this year, February 10, 1982, and I am pleased to report a number of changes we suggested have in fact been included in the Bus Regulatory Reform Act of 1982.

Specifically, ICC regulation of the issuance of securities for motor carriers has been eliminated and another provision in the legislation gives the Commission authority to exempt from regulation, merger, consolidation, acquisition of control transactions involving motor carriers of property. The Commission believes this exemption provision will be extremely helpful in providing flexibility and permitting expedited implementation of mergers, consolidations and acquisitions of control where Commission consideration is not necessary.

Further legislative initiatives are under consideration. We intend, at a minimum, to propose a broad motor carrier exemption provision along the lines of the exemption authority we have under the Staggers Rail Act. Personally, I think that that might be one of the best moves we could make.

In addition, the Commission is taking a hard look at all facets of motor carrier regulation and we have been working closely with the Department of Transportation and other representatives of the administration in developing new legislative initiatives, including the possibility of recommending the sunset of ICC's regulation of motor carriers.

That does conclude my prepared remarks, Mr. Chairman. I will be glad to try to field any questions that you might have.

Senator **Danforth**. Thank you very much, Mr. Taylor.

Is the Commission studying or investigating the effect of volume, multiple tender, and rate discounts?

Mr. TAYLOR. Yes, Mr. Chairman. We have a proceeding that is entitled "Ex Parte No. MC-166," in which we hope to get into all kinds of pricing practices that have developed since the act. We—and I should make this very clear—do not intend as a result of that proceeding to throw out any floors and establish any minimum rates below which discounting will not be allowed to go.

But we still have the words "predatory" and "discriminatory" in the act; they were not changed in 1980. To the extent that we feel an illegal activity is shown, we would expect to address it.

That proceeding, as I indicated, should be productive of comments by January 15. There is also a possibility that we may go out into the field to allow some of the people who are having a difficult time getting to Washington to express their views to be heard.

Senator DANFORTH. Do you hear a lot of complaints or a significant number of complaints about the Motor Carrier Act and how it has affected the industry?

Mr. TAYLOR. Well, it depends on whom you talk to. Many shippers are quite happy. This is really the day of the shipper in terms of prices, at least. They are able to get almost anything they want, and they certainly have more service available to them.

Owner-operators are complaining, particularly about the price discounting that is going on. That is the biggest thing we hear from them. We did readjust the fuel compensation program for them and put it on a mileage basis. They do not seem as concerned about that any more as they do about the fact that there is price-cutting going on.

But then that was one of the things that was anticipated in the act—the advent of new price and service offerings. So we are beginning to see, as you brought out earlier, what is going on in the context of an economic downturn which has, of course, led it to be a little more active and a little bit more of it than anyone had anticipated.

I, too, share the thoughts of the Department of Transportation that it is a shame that we have had to engage in deregulation in the context of an economic downturn. It would have been much better had we been able to do all of this when the economy was moving well.

Senator DANFORTH. Of course, it is a great thing for the shipper. It would have a very bad effect on the smaller carriers, wouldn't it?

Mr. TAYLOR. Well, I suppose the smaller carriers—I know you asked that earlier as well—are in a little bit tougher situation to withstand the problems because, of course, they do not have as much cash flow, and the bigger guys, it is always easier for them to withstand difficulty than the little guys.

We do not get any more figures on class 3 carriers, endeavoring to advance regulatory reform and lighten the paperwork burden, since we did not do an awful lot with class 3 carrier reports. We do not get information on class 3 carriers any more, but I would guess, as the Department of Transportation did—and they are doing a specific study on it—that the smaller carriers are having a difficult time and perhaps, in many cases, more difficult than some of the bigger carriers.

Senator **Danforth**. Well, what do we intend to do about that? My concern is that basically what is being said by the ICC and the administration is "Well, we all have problems."

Mr. **Taylor**. I do not think that any of us are trying to be that cavalier. I am personally very, very concerned about what is going on in the trucking industry. After all, the economy is going to turn around eventually, and it is very important that we have the capacity to handle a turned around economy as well.

So we are trying to be very attentive to what is going on, and that is the reason we are having this pricing practices proceeding. It would have been quite easy to just rise above the fray and say: "we don't want to hear all of that," but we are going to hear it. We are going to get into it and see what is going on in that area and see what can be done.

I think my whole time at the ICC has been marked by an approach which I refer to as gradualism, so we try to keep moving down the deregulatory path but not with such reckless abandon as to create havoc in the process, because that would only result in an engraved invitation to reregulation. So we have been very sensitive to try to do it with a degree of rationalism and it is difficult in terms of the economy we are in today.

Senator **Danforth**. Clearly at a time of recession, a very deep recession, and at a time when we may or may not be imposing additional burdens on truckers by way of use taxes and fuel taxes, if there was ever a time for gradualism, it is now. Would you agree?

Mr. **Taylor**. I certainly would, Senator, and that is why I think if there is going to be additional reform—and I just speak personally now, for myself and not for the Commission—but there may be some exemption like we have under the Staggers Act because I think we could play out the rope, depending upon what the situation warrants at the time.

I think that would afford us the opportunity to implement some gradualism.

Senator **Danforth**. That would require a change in statute?

Mr. **Taylor**. Well, we kind of have our nose under the tent, so to speak. In the Bus Act, as far as mergers, consolidations, and acquisitions are concerned, we did get some exemption authority, but not for motor carriers of passengers but, rather, for motor carriers of property. So to the extent that that is a harbinger of things to come, I personally think that that is a rather good development.

However, whatever the administration decides to come down with I think we are going to be cooperative. We have tried to be involved in the talks and discussions that have been going on, and I do not think, as the Department of Transportation indicated, that plans have actually been finalized at this time.

Senator **Danforth**. I remember when you were here on Friday. You indicated that you wanted to have an open door to shippers and an open door to those in the moving industry. Do you feel the same about trucks?

Mr. **Taylor**. I have genuinely tried to do that at every opportunity. I do not think that there is anybody who has sought access to our office that we have not seen. I recently spent about 2 or 3 hours with the ATA people—Mr. Gaussoin—listening to their problems and difficulties.

We have had shipper groups in. I was out speaking to the NIT League group and have spent quite a bit of time with all those people. They know that they can come into the Commission anytime they want to and tell us what is going on. I think we have had the same kind of open door policy with the trucking industry, generally, that we have had with household goods movers.

Senator **Danforth**. Finally, the same question I asked of DOT. The Teamsters have expressed a very great concern about the effect of this particular act and they have submitted written testimony. Could you respond for the record?

Mr. **Taylor**. We would be very happy to, Mr. Chairman, and I might say I guess the Teamsters probably have been the biggest losers as a result of the act. That is one of the things that is pointed out in the GAO report.

The report indicates that it is really the economy that is at fault in terms of the unemployment, but, as I indicated in my statement, I think that I do state that the increased competition has led to the Teamsters not having as big a piece of the organized truckers as they used to have.

But we would be happy to respond, absolutely. I know that they previously gave some figures about unemployment and a number of trucking companies that were in difficulty, and we did some evaluation on that, and we did find that some of them were in serious trouble back in 1978, 1979, and 1980, before reform actually got underway.

Of course, I think it must be remembered that, even if we were in good times, it was contemplated with regulatory reform some of the more inefficient companies probably were going to be in difficulty and perhaps not survive. I think there is some of that which should be taken into account as well because we know and we have done some checking.

As a matter of fact, I had Ron Young and our Bureau of Accounts take a good long look at the various regions, and we have determined there are a number of companies which have been in serious difficulty for the past 3 or 4 years, before any reform was undertaken. And, of course, if they do not mind their P's and Q's and get a handle on their costs, the economy is only going to exacerbate the problem.

Senator **Danforth**. Other than exemption authority, is there anything that Congress should be doing?

Mr. **Taylor**. Well, we did make a proposal about eliminating the evidence of public need standard, because I would like to see fitness only and a safety and insurance basis advanced as the entry standard for the industry.

I think that entry is really a past situation. We have got so many carriers now, so much capacity in freight, that I do not think that that is the issue it was several years ago. We wasted a lot of time trying to sculpt certificates which I think is largely wasted. I think we would be far better off if we had just a good fitness and safety entry standard—fitness based upon safety.

Senator **Danforth**. Right. I mean, that would not exactly address the question that is expressed by those who criticize the act, though, would it?

Mr. TAYLOR. I think what we have to do is develop some information in that area in the pricing practices proceeding. To the extent that we feel we do not have the tools to deal with that, then I think certainly we should come to Congress and say: "Now wait a minute. Maybe there are situations in which pricing activities should be looked at."

But we are in the midst of that proceeding and still trying to develop the information with respect to it. Hopefully, that will be productive not only for us but for Congress as well.

Senator DANFORTH. Do you know when we can expect that to be concluded?

Mr. TAYLOR. The comments are due January 15. It then depends upon the volume and the scope of it, and so on. It is a fairly extensive proceeding. I could submit for the record, actually, the questions that we have posed in MC-166. You might be interested in that. It is fairly farreaching and it would depend, based upon those answers, whether we go out in the field and hold hearings. We have not made that determination yet.

Senator DANFORTH. Well, is that viewed as a matter of some moment, that it is not going to be conducted at a leisurely pace?

Mr. TAYLOR. Oh, no. In times past, what has been the nice leisurely ICC pace, I have tried to put all the spit on the ball that I can. We will move along as quickly as possible.

Senator DANFORTH. Senator Packwood.

The CHAIRMAN. Mr. Chairman, if I hear correctly, you would recommend that the fitness test should be safety and insurance only?

Mr. TAYLOR. That is correct.

The CHAIRMAN. In the last part of your statement you said: "Also under consideration would be the question of whether to recommend the sunset of ICC motor carrier regulation."

What are the factors in your mind that need to be answered affirmatively before you would make that recommendation?

Mr. TAYLOR. I think largely, Senator Packwood, we are going to go along with whatever the administration and the Commerce Committee deem to be appropriate. As far as I personally am concerned, I think the only two things that are left are the enforcement arena and this matter of pricing.

I think if we are not going to do anything in the pricing area or we feel we cannot do anything in the pricing area, we are probably more a nuisance to the industry than we are effective.

The CHAIRMAN. Are you talking about predatory pricing or just generally pricing?

Mr. TAYLOR. Just generally pricing, and I think your whole antitrust question gets into that too. I attended the hearings the other day when the antitrust question came up, and I think as far as ratemaking goes, you are going to find an awful lot of people in the trucking industry who are going to say the ICC is more of a problem in bothering us than they are effective in dealing with us.

The CHAIRMAN. Should we get rid of it? Say you put it down the road 3 or 4 years so you cannot say it is in the middle of a recession—and Lord knows, if we are not in good shape in 3 or 4 years, whether or not we do anything is not going to make any difference.

Mr. TAYLOR. Who knows where we are going to be, if we are not in good shape in 3 or 4 years, as you say.

The CHAIRMAN. It does not make any difference what you or we do.

Mr. TAYLOR. Exactly so. I think ultimately that is where we want to go.

The CHAIRMAN. We should get rid of the immunity for collective ratemaking?

Mr. TAYLOR. I think we also want to get rid of regulation for the freight carriers. Certainly I think there is a distinction to be made between freight carriers and household goods movers. I think something may need to be done with that.

I think the whole question is really one of timing. I mean, we are here at a very difficult time today. We know it is difficult for the industry, but in terms of ultimately winding up there, yes, I think that is where we should wind up, without question.

The CHAIRMAN. Good. So I can cite you, at least, as chairman, saying we should at some time get rid of the antitrust immunity for collective ratemaking?

Mr. TAYLOR. Yes, you can.

The CHAIRMAN. Now let us back up again to what are the factors you want to consider when we are going to sunset ICC motor regulation. At the moment, service as far as shippers are concerned appears to be good. You have more empirical evidence than we do. We are more subjective, but I can assure you that Senator Danforth and I and other Members of the Senate would pick up any complaints, any significant complaints, that shippers would have. They complain.

Service in small towns seems to be adequate. Your testimony indicated that. And again, as I go to small towns I do not pick up any complaints about service.

Mr. TAYLOR. You are absolutely correct. We did our study. It is dated September 1982. It is part of the record, and this is exactly what it shows. This study was done with a great deal of care. We wanted to be absolutely certain that we did not end up cutting the body to fit the bag and have a preconceived notion of the conclusion we wanted to reach.

As a result, I would be glad to have Dr. Southard comment a little bit about it, because it is his department. He put it together and he knows very, very well—and I asked him to do it totally impartially. Why don't you just quickly——

The CHAIRMAN. I would like to hear what the Doctor has to say for the record.

Mr. SOUTHARD. Thank you.

I just might mention one additional word about the timing of the study. The study was done in three phases. We interviewed a random sample of shippers and receivers, and a sample of small communities. "Small communities" were defined as 15,000 population or less and communities that are not contiguous to a major metropolitan area. In other words, we focused on essentially rural-type small communities.

We sent out a rather comprehensive questionnaire, we believe, to a sample of motor carrier customers in these small towns. The first one went out 6 months after the Motor Carrier Act, in January 1981. We resurveyed that group of people and sent a questionnaire to another group of shippers and receivers in July 1981 and followed up on both groups in January 1982.

The last results we have are the first of this year. We are convinced that small communities have not been hurt. As the chairman said in his testimony, an overwhelming majority of customers in the small communities indicate things are about the same, frankly. When changes have occurred, more respondents say they have changed for the better than the worse.

The CHAIRMAN. Well, certainly the fear did not come through, as some alleged, that when we passed the Motor Carrier Act the small towns were simply going to lose service.

Mr. SOUTHARD. That is correct, sir.

Mr. TAYLOR. Absolutely it has not happened. I have some figures on complaints, Senator, starting in October 1979 all the way up through October 1982. In the just total complaint area, for example, in April 1980 we reached a high of 2,485 complaints, and yet in October 1982 we only had 831.

In service complaints—just specifically service—we had a high in November 1979 of 361, but in September 1982 we only had 58, so it has gone down, no question about it.

The CHAIRMAN. You have had a tremendous increase in entry since the act.

Mr. TAYLOR. Enormous.

The CHAIRMAN. I think there has been no, therefore, effective, at least long-term predatory pricing. You cannot do it for an extended period of time and then try to make up your profit someplace else, or somebody is going to say I am going to move into that market.

Mr. TAYLOR. Well, that is the argument. Can you really even have such a thing as predatory pricing today, because, after all, if you drop the prices down and you run off all the competition, then the final act in the predatory scenario is to put them back up again when you have monopoly control. At that point in time, aren't you, with free entry, going to see all kinds of people coming back into the field?

That is one of the things we want to explore in this MC-166 proceeding. One of the questions is: Can there in today's climate be anything specifically that is predatory? The trucking industry says, "But do you have to destroy a lot of people in the process to get there?" Well, I think the cost-conscious people are not being destroyed.

It was contemplated, as we said, that a number, even in good economic times, were going to experience some difficulty.

The CHAIRMAN. Well, I was intrigued. I have got some figures here on operating ratios for a random sampling of different companies. Some have not done as well as they used to do under regulation; others have done better.

Roadway's operating ratio in 1978 was 89.8. It is now 91.9. They have gotten worse.

Barber Transportation in South Dakota has gone from 96.3 in 1978 to 94.8 in 1981. I do not have any figures for 1982. Smalley Transportation, 101.2 in 1978, to 96.1.

Some of them have gone up, but my hunch is it has more to do with management's ability than it has to do with geographic location or good times-bad times, because in many of these examples I could cite some companies in the same area, the ratios have gone up or gone down and are basically competing for the same type of customer.

Mr. TAYLOR. Senator, I think you are absolutely right, and I have some figures in that regard, too. We heard at the House oversight hearings in June—I think particularly from the Teamsters—about the number of people that were unemployed, and they picked out some specific companies to refer to.

One of them was Wilson Freight, which went bankrupt in July 1980. It has now ceased all operations. The point about that company is that they were losing a serious amount of money in 1979 and also in 1978 before the whole business began.

Spector-Red Ball, we have heard an awful lot about that one. They did not put themselves together until 1980, but in 1981 they had a big loss and we put the two together in 1980 and they still had a loss.

Cooper-Jarrett, we have heard about that one. They are no longer operating, but they had losses in 1981, 1980, and 1979.

Mid-American Lines, they are operating only a special commodity division at this present time. They lost money in 1981, 1980, and 1979. The same is true of Boss-Linco Lines—they have ceased all operations—for 1981, 1980, and 1979.

For Johnson Motor Lines, they have ceased all operations. In 1979 they lost a hefty amount of money. Rio Grande Motorway, 1981, 1980, and 1979, substantial losses as well. And Time-DC, had losses in both 1981 and 1980.

I asked our Bureau of Accounts, Ron Young—perhaps he would want to amplify this—to give us some figures on some large motor carriers which reported net losses in each of the past 3 years.

For the eastern division, he came up with no less than eight, and they include such companies as Branch Motor Express, Central Transport, Commercial Lovelace, Cooper-Jarrett, Eazor Express, IMFS, Motor Freight Express, and United Trucking Service. And in the western district some seven companies, including Briggs Transportation, IML Freight, LeeWay Motor Freight, Pacific Motor Trucking—which I personally know has been in financial difficulty for a good long time—and Schwerman Trucking, System-99, and United Transports.

Ron tells me, too, that 20 of the 100 largest carriers do have acceptable operating ratios. Only 8 of the 100 carriers have increased in the 12 months ended September 30, 1982. Perhaps you do have some additional figures, Ron, that you might want to talk about, because I brought him along for this specific reason.

The CHAIRMAN. Well, then, let him talk.

Mr. YOUNG. Those figures pretty much summarize the condition of the motor carrier industry. During the 12 months ended September 30, the returns on equity for the 100 largest motor carriers—and those carriers represent approximately 44 percent of the revenues for the class 1 and class 2 carriers—their operating return on equity figure has gone from 14 percent to slightly under 4 percent.

We have looked at all of the operating ratios of these companies and, as the chairman indicated, only 20 companies of those 100 largest have operating ratios which are 95 percent or lower, which is considered acceptable.

During the last 12 months, only 10 of the 100 largest companies have increased their return on equity. So the financial condition of the motor carrier industry across the board, carrier-for-carrier, all of the large carriers, is down.

If you look at the tonnage, it is all down. In many cases you will find that revenues have gone up, tonnage has gone down, profits have gone down, and part of this is due, I presume, to price-cutting and also repositioning due to deregulation. Basically that is where we are in terms of the financial indicators for the industry as a whole.

The CHAIRMAN. Mr. Chairman, let me ask you this: You have already indicated that you thought immunity for collective ratemaking should be terminated at some stage down the road. As you know, immunity for single run ratemaking runs out on July 1 of 1984. There has been some argument that we should terminate collective—I mean, joint line ratemaking at the same time because it is almost impossible to sit in a meeting without being subject to an antitrust suit if you have gotten rid of single line immunity, but not joint line.

Do you find that a valid argument?

Mr. TAYLOR. I think it is very valid. I do not see how you can do for one without doing for the other.

The CHAIRMAN. Would you recommend that we also terminate the immunity for joint line?

Mr. TAYLOR. Yes.

The CHAIRMAN. Thank you. I have no other questions.

Senator DANFORTH. Thank you very much, Mr. Chairman.

Mr. TAYLOR. Thank you very much, Mr. Chairman. We were delighted to be here.

[The statement follows:]

STATEMENT OF HON. REESE H. TAYLOR, JR., CHAIRMAN, INTERSTATE COMMERCE COMMISSION

Mr. Chairman and Members of the Subcommittee: I want to thank you for the opportunity to appear here today at the second annual Senate oversight hearing to present the views of the Commission with regard to the implementation and effects of the Motor Carrier Act of 1980. In addition to the statement, we have included the following attachments: (1) a list and explanation of the current status of proceedings initiated by the Commission to implement the Act; (2) a summary of significant Motor Carrier Act proceedings under judicial review; (3) studies and reports that form the basis of the Commission's monitoring efforts; (4) the latest earnings and traffic volume date for the 100 largest motor carriers of property; and (5) information on 1982 general rate increases.[1]

INTRODUCTION

On June 18, 1981, at last year's Senate oversight hearing, the Commission testified that the motor carrier industry and the users of its services have responded favorably to the changes mandated by the Motor Carrier Act of 1980. I would like to reaffirm that view today.

In the second year of implementation, there is even more reason to believe that the significant reforms of the Motor Carrier Act—namely, eased entry, rate flexibility, and reduced antitrust immunity—have resulted in a more competitive environment in the trucking industry. This is not to say that, in so testifying, I am unaware of the serious finanical difficulties experienced by many motor carriers. Tonnage figures show a marked reduction in traffic for the industry, which has had adverse effects on employment levels and carriers' profits. It appears, however, that economic conditions, rather than regulatory reform, are the principal cause of the industry's declining financial performance.

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[1] Designated appendix I, II, III, IV and V, respectively. (Retained in the committee files.)

Nevertheless, this situation is of concern to the Commission, as evidenced by a recent conference, held on October 5, 1982, at which we discussed the pricing practices of motor carriers, and decided to elicit comments from the public to gain a greater understanding of the current situationi. Comments in that proceeding, entitled Ex Parte No. MC-166, are due on January 15, 1983. (A copy of the Notice is included as Appendix VI).

At this point, I would like to highlight some of the indicators that have led me to conclude that the Motor Carrier Act reforms are indeed working:

Since the effecting date of the Act, July 1, 1980, 13,806 new carriers have received authority from the Commission. This marks an increas of 10,874 over the figures reported to this Committee over a year and a half ago. More than 5,900 grants of authority have been issued to new carriers in just the last six months.

The total number of new certificates served since the Act went into effect is 49,726. There was an increase of approximately 13, 726 ner certificates since the last Senate hearing and, of this number, 6,726 were served from the period June 1, 1982 through November 15, 1982.

As expected, applications appear to have leveled off. As of June of this year, applications were being filed at a rate of approximately 1, 100 each month. Since June, there has been a slight decline in filings to about 1,000 per month.

Overall, shipper satisfaction with the level of service remains high.

Where small community service has changed, it has generally improved. Of the shippers surveyed in the Commission's nationwide small community survey. 9% to 20% said more service was available now than before the Act, 77% to 90% said the availability of for-hire truck service was unchanged, and only 2% to 5% said less service was available now. With respect to freight claims, 85% to 97% of those shippers surveyed indicated either that they had no claims or that there had been no change in their ability to resolve the claims. Three percent to 8% indicated more problem and 1% to 9% indicated fewer problems with respect to claims.

Pricing innovation and independent ratemaking have continued to increase since passage of the Act. In 1981, 115,085 independent rate actions were reported by major rate bureaus. The figure for fiscal year 1982 is 180,829.

Although initial results indicated that the new law had little positive impact on owner-operators, recent figures suggest that, increasingly, they are making use of the special provisions of the Motor Carrier Act to obtain their own operating authority. Just since June 1, 1982, 118 owner-operators have been granted certificates for operating authority.

The Motor Carrier Act has significantly reduced the role of the Commission which has lessened the workload. As a result, authorized permanent full-time staffing levels have decreased to a projected 1,425 for fiscal year 1983. This should net considerable cost savings.

In response to the revised National Transportation Policy, a program has been initiated to promote greater minority participation in the motor carrier industry. A list has been developed of existing minority carriers. We are presently updating that list, and a monitoring program has been put in place. In addition, a serices of hearings were held to find out whether minority carriers encounter any special problems in intering the idustry. The results of the Commission's efforts in this area are contained in a report entitled, Ex Part No. 150 (Sub-No. 1), "Report on Minority Participation in the Surface Transportion Industry," which appears in Appendix III.

SERVICE

At last year's oversight hearing, the Commission indicated that the pre-Motor Carrier Act predictions of strenghened competition among carriers, resulting in lower rates and increased price/service options for shippers, had to a large extent come true. We were very optimistic after less than a year's experience under the new law. Now that we have had an additional year and a half to work with the statute, the results are very encouraging.

While recent economic conditions may have had some impact, our experience indicates that the levels of service remain good. Complaints continue at a low level. During the first five months of 1982, complaint levels concerning motor carriers of property ranged from a high of 1,348 in March to a low of 1,069 for May. This is substantially below pre-Motor Carrier Act levels. In fiscal year 1982, the total number of complaints against motor carriers of property declined more than 3,000, compared to the number received in fiscal year 1981.

Even more significant, however, in measuring the success of the Act, is the status of service to small communities, since this was the area that most people were concerned would suffer from regulatory reform.

SMALL COMMUNITIES

On September 1, 1982, the Commission submitted a report to the President and to Congress on its investigating and study of motor carrier service to small communities as required by section 28 of the Motor Carrier Act. The "Small Community Service Study" (a copy of which is included in Appendix III), was conducted to develop data in accordance with the specifications of section 28 (b) and (c).

The primary basis of the investigation was s shipper survey of approximately 1,200 randomly selected businesses in small communities throughout the United States. The survey was conducted in three phases in order to compare shipper experiences for the eighteen-month period following passage of the Act. We examined availability of motor carrier service, all aspects of service quality, and rates to and from small communities. This included indirect measures, such as shipper complaints relating to motor carrier service.

The results of this study are remarkably consistent. While regulatory reform has caused no dramatic changes in small community rates or service, changes that did occur were generally favorable. In the vast majority of cases, shippers reported very little change in quality of service as measure by on-time performance, loss and damage claims and availability. In addition, where changes did occur, improvement in service was reported much more often than service deterioration. Complaints about trucking service in small communities have decreased significantly since passage of the NCA. Finally, an examination of rates indicates that rates to and from small communities have increased less rapidly than rates to or from larger cities.

Shippers reporting service availability improvement ranged from 3 to 8 times higher than those reporting poorer service availability (measured by the ratio of shippers reporting more availability to those reporting less availability). In addition, respondents reported more carriers starting service than carriers stopping service.

The majority of respondents reported that service was always or almost always on time, and that on-time performance compared to six months earlier had remained about the same. This consistency of performance was reported for both inbound and outbound shipments.

The majority of respondents reported that their shipments arrived always or almost always in good condition. Comparing this to performance six months earlier, 7% to 16% of the respondents reported that their freight was arriving in good condition more often.

The vast majority of shippers, 85% to 92%, indicated that options for receiving and sending their freight by for-hire truck were about the same as six months before. The remaining 8% to 15% reported a change in the availability of options with 2 to 4 times as many respondents reporting more options than those reporting fewer options.

Shippers indicated that the two most important sources of price information were the carrier and shippers' own experience; between 40% and 47% indicated that price information came from carriers and an additional 21% to 31% relied on their own experience for price information. Less thant 6% relied on Published Tariffs or Rate Bureaus.

Motor carrier complaint levels have been in a downward trend. There was a sharp decline in small community complaint levels immediately following the Motor Carrier Act. Since the Act, small community complaints have averaged less than half of the pre-Act level. Also, small community complaints concern similar problems as their larger community counterparts.

It is the conclusion of the study that the pre-Motor Carrier Act fears that carriers would abandon service to small communities have not materialized. In fact, the evidence suggests that small communities have actually benefited from this legislation.

SIGNIFICANT CHANGES DURING THE SECOND YEAR OF IMPLEMENTATION OF THE MOTOR CARRIER ACT

The second year of experience with the Motor Carrier Act was marked by an increase in the number of applications for contract carrier authority as a percent of all applications and in the percent of applications filed by first-time applicants. This is in contrast to the dramatic increase during the first year in the overall number of applications for permanent authority, a phenomenon which was primarily due to the initial surge by existing carriers to expand their authority under the new liberalized entry standards.

The following table illustrates these changes:

Dispositions	Percent of all applications (rounded)	
	July 1980 through June 1981	July 1981 through Nov. 15, 1982
All applications for contract carrier authority	16	28
New carrier applications for contract authority	3	10
New carrier applications for all types of authority	11	40

The trend of general commodity common carriers initiating special commodity operations has continued. Notifications by shippers of intent to engage in private carrier intercorporate hauling have increased, but at a declining rate, from 648 private carriers and 6,755 shipper subsidiaries as of June 2, 1981 to 772 private carriers and approximately 8,000 shipper subsidiaries as of April 25, 1982. As of November 29, 1982 there have been 876 CIH carrier filings. The trend toward an increase in private carrier operations appears to be losing momentum. More shippers are turning to contract carriage and common carriage as rates and services become more competitive. An example is GAF Industries which reportedly has moved entirely from its private carrier operations in favor of common carriage.

Several carriers have filed tariffs combining discount rates with guaranteed service. A delivery sufficiently late can result in a discount of as much as 40 percent below regular rates.

The number of independent rate actions taken in bureau tariffs provides additional evidence of increased competition. For ten major rate bureaus, the number increased by 90 percent during calendar year 1981 as compared to 1980—from 60,600 to 115,085, compared to 27,141 in 1979. The number of independent rate actions for fiscal year 1982 has risen to 180,829.

Shippers are benefiting by the increase in competition which has reduced rates and improved service. Many shippers are placing greater emphasis on a total distribution and logistics approach whereby they strive to optimize the balance between level of customer service and cost of service, and for any chosen service objective, to minimize the total costs for production and distribution. The number of opportunities to achieve these goals has multiplied as carriers compete with a variety of price-service options.

FINANCIAL CONDITION OF MOTOR CARRIER INDUSTRY

Turning to industry financial performance, the decline in tonnage which resulted from the recession has created excess capacity in much of the motor carrier industry. Concerns about excess capacity combined with desires to retain or gain market share have boosted incentives for discount pricing. One result of the recession and carrier market strategy has been an overall decline in industry financial performance. The 1981 drop in tonnage below the depressed 1980 level occurred mostly during the fourth quarter. Low tonnage levels continued during the first and second quarter of 1982.

A. Latest earnings data.—The most recent data released by the I.C.C.'s Bureau of Accounts indicates a substantial decline in revenues, income and traffic volume for the nation's largest trucking companies in the second quarter of 1982 as compared with the same period during the previous year. The report, contained in Appendix IV, compares the earnings of the 100 largest motor carriers of property (excluding two United Parcel Service carriers) for the quarter and twelve months ending June 30, 1982, with the corresponding quarter of 1981 and the twelve-month period ending June 30, 1981.

A comparison of the second quarter operations reveals that:

Operating revenues decreased 4.8 percent to $3.9 billion from $4.1 billion;

Revenue tons of freight declined 12.1 percent to 40.6 million tons;

Net carrier operating income decreased 39.4 percent to $113.4 million and net income also declined by 43 percent to $58.3 million.

A comparison of results for the 12-month period shows that:

Operating revenues rose 1.2 percent to $15.8 billion, due to rate increases;

Traffic volume declined 8.3 percent;

Net carrier operating income fell 56 percent to $297 million from $672 million;

Net income also dropped by 58 percent to $157 million;

Rate of return on shareholders' equity decreased to 5.39 percent from 14.10 percent.

B. Recent bankruptcies and cessation of operations by motor carriers.—Since the Commission has legal jurisdiction over some aspects of railroad bankruptcies, we are officially notified of any bankruptcy filings by railroads. However, motor carriers are not required to formally notify the Commission when they file for bankruptcy or cease operations. Consequently, we do not have a definitive or an all-inclusive list of motor carrier bankruptcies, many of which involve small companies. However, it would not be surprising that motor carrier bankruptcies have increased, since the general level of business bankruptcies has risen substantially during the current recession.

The following is a list of large motor carriers which have recently either filed for bankruptcy or have ceased operations:

Latest available annual revenues

Wilson Freight Co., bankrupt July 1980, $165,123,000.
Spector-Red Ball, bankrupt April 1982, $413,272,000.
Cooper-Jarrett, Inc., bankrupt December 1981, $57,867,000.
Mid-American Lines, bankrupt March 1982, $38,317,000.
Boss-Linco Lines, Inc., bankrupt April 1982, $41,885,000.
Johnson Motor Lines, Inc., ceased operations August 1980, $94,578,000.
Rio Grande Motorway Inc., ceased operations May 1982, $21,409,000.
Hemingway Transport, Inc., filed for bankruptcy July 1982, $52,017,000.
Motor Freight Express, filed for bankruptcy October 1982, $74,048,000.

Time-DC, which reported revenues of $156 million for 1981, ceased operations on 4/1/82 as the result of a strike. Since that time, limited operations have been performed by the carrier's special commodity division. Time-DC hopes to resume an additional portion of its operations in the near future.

The American Trucking Associations (ATA) announced on June 1 that 144 established motor carriers had discontinued operations since mid-1980. These carriers reportedly had annual revenues estimated at $755 million and employed over 18,000 persons. ATA further stated that 47 additional carriers are experiencing financial difficulties—ranging from service curtailment to bankruptcy.

While ATA alleges that deregulation is the primary cause of the declining financial performance of the industry, it appears that motor carriers are experiencing the same financial problems that are affecting most segments of the economy. This conclusion is supported by a General Accounting Office report. The report, "Effects of Regulatory Reform on Unemployment in the Trucking Industry," dated June 11, 1982, concludes that "poor economic conditions, not regulatory reform, have been the likely cause of high unemployment in the trucking industry." The conclusion is based on an analysis of the relationship between trucking unemployment rates and combinations of several different economic variables. The analysis indicated that recent increases in trucking unemployment were likely caused by a downturn in the economy and that deregulation was only a minor influencing factor. The report shows that during the 1979-80 recession that total U.S. production of durable and non-durable goods declined 7.9 percent, and notes similar declines of 7.9 percent in truck ton-miles and 7.7 percent in trucking services employment. Declines in tonnage and revenues affect not only labor but all aspects of trucking, including overall financial performance.

In this regard, we would emphasize the recent high level of business failures in all sectors of the economy. A Wall Street Journal article (May 24, 1982), for example, in discussing the failure rate of airline and trucking firms, went on to point out the following:

"The percentage of failing companies has reached a post-Depression high. According to Dun & Bradstreet, business failures are occurring this year at an annual rate of 80 per 10,000 companies. That is 29 percent higher than last year's rate and within striking distance of 1933's rate of 100 per 10,000 * * *"

RATES

Since passage of the Motor Carrier Act, there has been greater pricing innovation and more independent ratemaking. As indicated earlier in my testimony, the number of independent rate filings increased by 90 percent during calendar year 1981 as compared to 1980; the fiscal year 1982 figure rising to 180,829. Total motor carrier filings have increased substantially: from 427,043 in fiscal year 1980; to

512,184, in fiscal year 1981; to 725,864 in fiscal year 1982. This represents a 42 percent increase in the number of tariff filings over the last fiscal year.

The vast majority of the filings are rate reductions. Volume discounts, multiple shipment discounts, shipper allowances, and aggregate tender discounts are among the new price options being offered by carriers. For a description of some of these discounts, see Staff Report No. VIII, "Highlights of Recent Activity in the Motor Carrier Industry, June 1982," contained in Appendix III. While some of the rate reductions may be due to economic conditions, it is clear that the Act has had a very substantial pre-competitive impact.

As I indicated earlier in the statement, we are investigating allegations of predatory and discriminatory pricing in Ex Parte No. MC–166, "Pricing Practices of Motor Common Carriers of Property Since the Motor Carrier Act of 1980."

With regard to the collective ratemaking process, this has been a year of transition. Our final decision in Ex Parte No. 297 (Sub-No. 5), which established new requirements and standards for motor rate bureaus as a condition to continued antitrust immunity, has now been in effect for just over a year and a half, although it has been the subject of court challenge. Ex Parte No. 297 (Sub-No. 5) was argued before the Court of Appeals for the 11th Circut last April, and a decision was issued on October 12, 1982, affirming, for the most part, the Commission's motor carrier rate bureau rules. The decision was remanded to the Commission for further proceedings with regard to two of the rules, the rule relating to cancellation of all outstanding special permission authorities for short notice to meet independent action rate reductions, and the rule relating to enforcement of the statutory rate bureau provisions through rejection of tariffs adopted in violation of a rate bureau agreement. With regard to the first, the court held that the rule was invalid, due to failure to provide for notice and comment prior to change in the Commission's longstanding practice. Concerning the I.C.C.'s proposed enforcement of the new rules, the court's decision generally affirmed the Commission's power to find rates unlawful for violation of a rate bureau agreement. However, the court held that the Commission cannot reject or suspend tariffs after they become effective. (See Appendix II for further discussion of this proceeding).

Since our decision became effective, the bureaus have been adjusting to the new ratemaking environment with limitations on single-line voting; limitations on discussion and bureau control over whether and when independent action, zone, or released rate proposals should be docketed; higher quorums; item-specific proxies; detailed minutes of all meetings where tariff items are discussed; and advisory and confidentiality restrictions on rate bureau staff. The bureaus have submitted revised agreements to conform to the Motor Carrier Act and our decision in Ex Parte No. 297 (Sub-No. 5), and those agreements are now being analyzed.

Meanwhile the Motor Carrier Ratemaking Study Commission is continuing its investigation of the collective ratemaking process and the "need or lack of need" for antitrust immunity (section 14 of the Motor Carrier Act). The Study Commission has solicited comments and held a number of hearings. Its report is due to Congress on January, 1, 1983. The Commission has actively cooperated with the Study Commission and has submitted testimony on two occasions, in November of 1981 and January of 1982. We will continue to offer any assistance we can provide as the Study Commission completes its effort. I should add that the Commission monitors rate bureau activities on a regular basis. During the past year, we have completed full compliance surveys of all major motor carrier rate bureaus.

The rate bureaus continue to process and file general increases, subject to the Act's limitation of discussion to industry average costs, and they realigned rates as the Commission converted the owner-operator fuel surcharge into a mileage-based compensation plan. Listed below is a summary of the most recent general increases:

General rate increases (including fuel "fold-ins"), March–April 1982

Rate bureau:	*Percent change over revenue level including fuel surcharge*
Central & Southern M.F.T.A	6.26
Central States M.F.B	6.50
Eastern Central M.C.A	4.60
Middle Atlantic Conference	5.96
Middlewest M.F.B	6.45
New England M.R.B	4.65
Pacific Inland T.B	2.46

	Percent change over revenue level including fuel surcharge
Rocky Mountain T.T.B	4.49
Southern M.C.R.C	7.89
Total	[1] .96

Subsequent general rate increases—1982

Central States M.F.B	4.4
Eastern Central M.C.A	7.1
Middle Atlantic Conference	2.0
Rocky Mountain M.T.B	5.0
Southern M.C.R.C	4.0

[1] Weighted average increases for the bureaus.

Additional detail regarding recent general increases is set forth in Appendix V. Various bureaus also proposed general increases applicable to particular segments of bureau traffic. These proposals, ranged from 1.25 percent to 5.18 percent are outlined in Table 2 of Appendix V.

In evaluating these collective rate proposals, it should be stressed that the percentage increases shown overstate the actual increase in rates, because of the number of independent filings which reflect rate reductions as discussed above.

OWNER OPERATORS AND THE MOTOR CARRIER ACT

The Motor Carrier Act of 1980 included a series of provisions designed either directly or indirectly to assist owner-operators.

One provision of the Act designed to aid owner-operators enables them to haul previously-regulated food or edible products (excluding alcoholic beverages and drugs) intended for human consumption, agricultural limestone and other soil conditioners, or agricultural fertilizers with their own ICC certificate rather than under a lease agreement, based on a "fitness test". This provision was designed to make it easier for owner-operators hauling exempt commodities from agricultural areas to find backhauls. Since June of this year, approximately 118 owner-operators have received authority under this provision.

Based on survey responses from our sample of approximately 500 owner-operators in two separate samples (a permanent and trip lease sample, respectively) taken in the spring/summer of 1981, during the first year of its operation, this provision allowing backhaul of food products has had little impact on the owner-operators in the survey. The future impact of this provision appears limited, based on owner-operator responses in 1981 regarding future applications. However, as I indicated earlier, there has recently been an increase of filings by owner-operators for authority under the "fitness only" provision of the Act.

In an effort to expand the opportunities for owner-operators to obtain agricultural backhaul traffic, Congress also expanded the list of exempt commodities to include livestock feed, poultry feed or seeds, and plants—items previously subject to ICC regulation. It was believed that owner-operators would have a greater opportunity to obtain such traffic and receive additional revenues.

The survey responses indicated that a significantly smaller share of the trip lease sample (3.4 percent) than the permanent lease sample (16.0 percent) hauled livestock feed, poultry feed, seeds, or plants during 1980. Owner-operators constituting about 3 percent of the trip lease sample, while not currently handling these items, expressed an intent to handle them due to the exemption included in the Motor Carrier Act. The comparable figure among those in the permanent lease sample is 20 percent. Thus, based on our survey results it seems difficult to point to any major impact that the inclusion of feed, seeds, and plants as exempt commodities has had upon the owner-operators at this time. However, the more competitive environment created by the Motor Carrier Act and the ease of operating in the exempt market may lead to greater future owner-operator interest and participation in the movements of these commodities.

It is our assessment that to date the specific provisions in the Act designed to directly assist owner-operators, particularly the single unit fleet owner, have had little impact on the vast majority of owner-operators, with the exception of the recent trend noted above.

With respect to the general provisions of the Motor Carrier Act designed to create a greater competitive environment in the motor carrier industry, the owner-operator opinions are generally negative. To a large extent, however, this may be attributable to the economic downturn which has affected the motor carrier industry. Many owner-operators responding to our 1981 survey complained about one or both of the following: (a) loss of business; and (b) reduction in rates that lowered their compensation. These same conditions have continued into 1982.

Overall, the Motor Carrier Act of 1980 held out the prospect of assistance to the owner-operators by easing entry and giving them the option of converting to carrier status. An analysis of responses to questionnaires from permanent lease owner-operators no longer under permanent lease and from trip lease owner-operators no longer in business indicates that owner-operators in our sample have elected this option to a very limited intent. It is interesting to note that the vast majority of the trip lease owner-operators in our sample who have converted to carrier status had multiple vehicle fleets as well as significant experience as an owner-operator. Owner-operators with such characteristics are definitely not the "typical" single vehicle owner-driver.

Survey results indicate that the "typical" owner-operator still perceives significant hurdles in obtaining operating certificates despite the reforms in the application process. First, many owner-operators still lack knowledge about the certificate application process. One respondent raised the following question: "Is it possible to obtain a certificate from the ICC to haul these items (listed by the owner-operator)? If I can obtain such a certificate, whom should I contact?"

A second obstacle to certificate acquisition involves the perception of expenses in preparing materials for presentation to the ICC. An owner-operator stated that he felt it necessary to hire a transportation consultant to prepare his certificate application materials. Such outside expenses may appear as a roadblock to the single vehicle owner-driver.

A third hurdle involves the insurance issue. On expression of this belief is: "I applied for contract carrier rights but I'm having trouble getting insurance because I don't have enough trucks."

Another owner-operator summed up this whole issue in a succinct fashion: "Owner-operators with small fleets have not been affected by deregulation. The Motor Carrier Act of 1980 is only beneficial to owner-operators with large fleets." In order to remedy these perceptions on the part of owner-operators, the Commission has spent considerable time and resources to inform owner-operators about the provisions of the Motor Carrier Act of 1980 and to assist them in obtaining authority. In conjunction with the Small Business Administration and the Department of Transportation, the Commission conducted 15 two-day training conferences for owner-operators across the nation in 1981. In addition to the on-site presentation, a 180-page manual was made available for each conference participant. The manual was designed to act as a permanent reference guide for owner-operators to secure information on economic regulations that relate to their businesses. Based on the success of the first year of the educational conferences, the Commission held 24 similar conferences in 1982. The Commission strongly supports these efforts, and budget permitting, will continue participating in this effort. The conferences were well attended by owner-operators and were beneficial in eliminating the misconceptions about entry into the motor carrier industry. Recent conferences have been broadened to include information and discussion of additional regulatory issues such as the new fuel reimbursement program.

In addition, the Commission's Small Business Assistance Office (SBAO) has been the agency focal point for providing practical information and advice to owner-operators on resolving their daily problems. The SBAO has also prepared a series of simplified informational bulletins on specific topics to further assist owner-operators and others in understanding how to conduct operations as a regulated trucker.

On a more positive note, the survey results did provide some indication that more owner-operators will, with the passage of time, pursue the option of obtaining an ICC certificate as we are beginning to see. On commented: "Within time the Motor Carrier Act of 1980 will be quite a change for a small fleet owner-operator. The ability to compete with large carriers has been needed for a long time. I intend, in the future, to apply for authority to help serve any community and local businessmen and still be sub-leased to a carrier. This combination will keep me in business." Another remarked: "I also plan on operating my own authority as soon as my authority application is granted."

The Commission has continued to address other specific owner-operator problems to facilitate their operation as leased operators or as certificated carriers. The following are examples of recent regulatory actions assisting owner-operators:

Leasing regulations.—The Commission has amended its leasing rules in Ex Parte No. MC-43 Sub-No. 13, "Lease and Interchange of Vehicles (Rules Modifications)," so that owner-operators can bargain more effectively with the trucking companies for which they work.

The revisions provide that failure to adhere to the terms of a lease negotiated between an owner-operator and a carrier will be grounds for Commission enforcement action. The regulations specify that payments to the owner-operator must be made within 15 days from the day the owner-operator submits the necessary paperwork. The Commission will limit the paperwork the owner-operator must file to documents necessary for the carrier to secure payment from a shipper, such as freight bills and delivery receipts.

Additionally, the Commission will require that carriers pay fines for overweight and oversize trailers when the owner-operator does not have control over the load and its distribution in the trailer. The ICC will specify that all legitimate charge-backs and deductions, including the means for their computation, be clearly identified in the lease and agreed upon between the parties. Charge-backs are items that are initially paid for by the carrier, but ultimately deducted from the owner-operator's compensation.

Loading and unloading of shipments.—A rulemaking (Ex Parte No. MC-43 Sub No. 11) has been concluded (February 17, 1982) which requires the lease between carriers and owner-operators to specify who is responsible for loading and unloading shipments, and what compensation, if any, is to be provided for the service.

The rulemaking was initiated to implement provisions of the Motor Carrier Act dealing with lumping.

Owner-operator leasing to private carriers.—By decision served February 17, 1982, the Commission reversed a 40-year policy which has generally prohibited leasing by owner-operators to private carriers. Such lease arrangements had been considered to be a for-hire transportation service on the part of the owner-operator, requiring operating authority from the Commission.

The decision would permit owner-operators and others who do not possess operating authority from the Commission to lease, in a single transaction, equipment and driving services to a private carrier provided the lease agreement meets certain criteria. Such transportation will be considered private carriage conducted by the shipper and, therefore, not subject to Commission regulation.

The decision, which had been scheduled to go into effect on March 23, 1982, has been stayed by the U.S. Court of Appeals for the Eleventh Circuit, pending judicial review.

Private carrier trip leasing to authorized carriers.—The Commission adopted final rules on November 29, 1982, in Ex Parte No. MC-43 (Sub-No. 12), "Leasing Rules Modifications," allowing private carriers to trip-lease their equipment and drivers to authorize carriers.

The new rules are expected to promote competition and the efficient utilization of equipment and energy resources. In addition to the obvious advantages for private carriers, it is anticipated that for-hire carriers will also benefit through the ability to augment their fleets with equipment leased from private carriers, thus enabling them to improve service and avoid high-cost, one-way hauls.

In conclusion, owner-operators, particularly single-vehicle fleet-owners, were singled out for special attention by Congress in the MCA. However, the specific measures designed to assist them have had relatively little impact when viewed in the aggregate. Based upon the owner-operators' own assessment, prospects for future benefits from these provisions are not encouraging at this time. Owner-operators view the new competitive environment encouraged by the Act in an unfavorable light, although many of their insights are based upon events stemming from the economic recession. As a result, to the extent that events change as the economy recovers, so also may the opinions of the owner-operators about the Act. At present, however, owner-operators who have benefited from the Act have been primarily those who own more than one vehicle and have obtained their own operating certificates. For a more detailed discussion of these findings see "Owner-Operators and the Motor Carrier Act of 1980" in Appendix III.

COMMENTS ON REPORTS AND PARTICULAR SECTIONS OF THE ACT

Restriction removal.—Applications by motor common and contract carriers to remove unnecessary restrictions from operating authority under 49 U.S.C. 10922(h) have fallen off dramatically. The restriction removal procedures allow for the broadening of a carrier's authority by enlarging the categories of property authorized to be transported and the territory that can be served. Such broadened authorities allow for intermediate point, round-trip, and county-wide minimum service. The procedures also permit elimination of other limitations which the Commission finds wasteful fuel, inefficient, or contrary to the public interest.

Since the inception of the program, in January 1981, almost 5,300 applications for broadened authority have been filed. Approximately 250 to 300 applications have been received since June. This follows the general decline in all motor carrier applications for authority. Virtually all of the applications published in the Federal Register have been approved. A few were modified slightly after consideration of comments which were submitted in individual cases. As of June of this year there had been only 166 administrative appeals from decisions made by the Restriction Removal Board. There has been no appreciable increase in the number of appeals since that time.

As a result of the decline in the level of filings, the Commission in November disbanded the Special Task Force which had been set up specifically to handle the restriction removal cases. The applications are now being handled by the regular employee boards.

Other developments in this area include the adoption of rules which make the restriction removal procedures applicable to freight forwarders. The Commission took this action in Ex Parte No. MC-142 (Sub-No. 2), in October; however, the rules have been stayed by the Fifth Circuit Court of Appeals. Also, the Commission has recently issued restriction removal rules for passenger carriers in Ex Parte MC-142 (Sub-No. 3), which implements section 7 of the Bus Regulatory Reform Act of 1982 providing for removal of restrictions against service to intermediate points along interstate routes.

Food and grocery products transportation.—Section 8(b) of the Act requires the Commission to monitor the extent to which cost savings accruing to customers by reason of compensation permitted by section 8(a) [2] are being passed on to the ultimate consumer. The second annual report to Congress was submitted on July 1, 1982, as required by section 8(b). (For a copy of the report, see Appendix III.) Last year, as a result of lack of activity, we were unable either to quantify the magnitude of savings from customer pick-up activity or to assess the degree to which such savings might be passed on. This year, with the assistance of consultants familiar with the wholesale and retail grocery industries and our own grocery industry contacts, we were able to obtain limited but reliable data. The conclusions reached in the report are as follows:

(1) The passage of section 8 and other related sections of the Motor Carrier Act of 1980 resulted in a small but significant increase in customer pickup in 1981 compared to 1980, and a rather substantial increase this year according to available 1982 data.

(2) There is no indication of any measurable failure to pass Section 8 savings through to the customers as required by the Act.

(3) While there are some minor and potential problems, no evidence of significant difficulties, abuses, or patterns of discrimination against small wholesalers or retailers as a result of Section 8 was uncovered.

(4) While the net cost savings from Section 8 have not reached the magnitudes originally estimated by proponents of the section, savings are likely to be substantial.

The report estimates that approximately $109 million more was paid in customer pickup allowances in 1981 than in 1979. In order to determine the estimated level of customer pickup allowances resulting from Section 8, that figure would have to be reduced by several factors, including the effects of inflation and expansion of inhouse motor carrier operations not related to Section 8, such as intercorporate hauling. Finding out what amount was being passed through to the ultimate consumer presented a more difficult problem. Because of the various accounting practices employed, we could not trace with any certainty through the accounting process of both wholesale and retail functions to the ultimate shelf price. Instead, we employed statistical analyses of the relationship between measures of customer pickup activity of representative groups of wholesalers and retailers, and measures of these firms' profit levels. Since profits represent only about one cent or less of each sales dollar, any significant Section 8 savings not passed on would increase profits in a measurable way. Thus, a significant positive relationship between customer pickup activity and profits could indicate the possibility that Section 8 savings were not being passed on, while the absence of any such relationship would be a strong indicator that savings from customer pickup were not being retained by the firm. The statistical results, as interpreted by the consultants, showed that the savings were not being retained.

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[2] Section 8(a) of the Motor Carrier Act of 1980 permits sellers of food and grocery products who sell under a uniform zone delivered price system to reduce the price of their products by an amount that does not exceed the actual transportation cost savings to the seller if the purchaser picks up the products himself.

Ex parte No. 410 and lumping enforcement efforts.—The Motor Carrier Act of 1980 requires the Commission to study and report to Congress on the loading and unloading practices of motor carriers of property. The requirement is found in section 15, the "lumping" provision of the Motor Carrier Act. The study conducted by the Commission in Ex Parte No. 410, decided February 23, 1982 concluded that loading and unloading problems are the exception and not the rule.

The vast majority of loading and unloading problems that do exist are particularly concentrated in the unloading of perishable commodities. In these situations, section 15 frequently is not the only law violated. Tax, labor, antitrust, and extortion violations may be involved as well. The use of casual laborers, or lumpers as they are called, is largely confined to truckload service; in particular, to meats, processed foods and exempt produce.

Unloading abuses are never precisely the same from one problem area to the next. As is widely recognized, unloading problems occur most frequently in the delivery of fresh produce. Produce is typically delivered to two types of facilities—wholesale markets and chain store distribution centers. A typical facility may receive as many as 35 to 40 loads of exempt fresh produce daily.

In the past these facilities may have declared openly that drivers must accept and pay for unloading assistance, many in the belief that their cost of the produce and the transportation also includes unloading. While such a policy would now be in violation of section 15 unless the drivers were reimbursed by the facility, there still appear to be facilities where this policy prevails. However, a facility that desires the use of unloading assistance will now be more circumspect, using delay, exorbitant equipment rental fees or other artifices to impose their wishes.

Several conclusions can be drawn from an analysis of the problem markets described in Ex Parte No. 410.[3]

(1) Unloading rather than loading is the problem area.

(2) The driver's resources have been expended; he must unload to recover his costs and, in the case of perishables, must unload quickly.

(3) It is not the payment of a charge for legitimate service that is the economic harm. Harm arises out of inflated charges and fees for illusory services.

(4) The power to charge in excess of the services provided often requires the cooperation or connivance of the receiving facility.

(5) Since the tactics of extortion may be easily disguised, clear cut violations of section 15 may be hard to demonstrate.

And finally, the combination of cash payments and the potential for exorbitant fees creates an atmosphere which is congenial to bribes and corruption.

Since January 1, 1981, the Commission's field offices have assigned approximately 69 cases for investigation of possible lumping violations, 46 of which have been closed due to lack of sufficient documentation. Twenty-three cases are still pending, one in a Grand Jury proceeding.

The Commission has targeted 167 facilities as potential areas of lumper abuse. These facilities are now being contacted directly by Commission personnel or are programmed for surveillance by Commission personnel. In situations where the contact has failed to indicate a lumper problem, the facility has been "placed on notice" as to the requirements of section 15.

In addition, both the field and Headquarters staff have been involved in road checks and, as part of our "Driver Outreach Program," which involves visits to the larger truck stops located throughout the Nation, have interviewed nearly 3,000 road drivers regarding their various problems, including lumping. As a result, significant information and documentation has been made available.

In order to enhance the enforcement program with respect to the anti-lumping provisions of the Motor Carrier Act, the Commission has increased its investigative efforts and has established a comprehensive, thorough, and uniform system of conducting lumper investigations. All lumper complaints, oral or written, are afforded the highest priority and attention.

Written contracts of haul.—Section 16 of the Motor Carrier Act instructed the Commission, in cooperation with Secretary of Agriculture, to require, where appropriate, the use of written contracts governing the for-hire motor transportation of interstate or foreign shipments of agricultural commodities otherwise exempt from regulation under 49 U.S.C. 10526(a)(6).

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[3] A copy of the Commission's Report to Congress in this matter is included in Appendix III.

Subsequent to the Act, a joint ICC and USDA task group began an investigation of this issue. The task group determined that, prior to the institution of any formal action, it would be extremely important to have public comment on the issues involved. An initial working paper which raised a number of issues for discussion was published for public comment.

In addition, a series of hearings was held in seven cities across the Nation during January 1981. Finally, the Commission conducted independent surveys of drivers and owner-operators to insure that their input was adequately reviewed and analyzed.

Upon review of the record of the public hearings, as well as the results of the ICC's independent surveys, the Commission and USDA concluded that, while problems remain in the transportation of these commodities, there are strong indications that the imposition of a standardized written contract could create serious difficulties for the fresh fruit and vegetable industry without any assurance of overcoming the truckers' problems. Indeed, we found reason to believe that the use of a contract could result in diminishing the participation of independent truckers in this traffic, contrary to the intent of the Motor Carrier Act of 1980 to increase the opportunities available for these independents. The Commission also concluded that it would be inconsistent with the intent of the Motor Carrier Act of 1980 to proceed with further consideration of a written contract for fresh fruits and vegetables in the absence of a compelling record to do so, particularly without the concurrence of the Department of Agriculture. Consequently, the Commission believes that other means of addressing these problems should now be stressed.

We are strengthening our commitment of enforcement resources in this area and have under consideration several other proposals aimed at improving the opportunities and the environment in which the owner-operators do business. We do not intend to give further consideration to the use of a written contract for the transportation of fresh fruits and vegetables or any other agricultural commodities otherwise exempt from regulation under 49 U.S.C. 10526(a)(6).

The final report of our findings regarding this section was transmitted to Congress on March 24, 1982. A copy of this report is included in Appendix III.

Section 19 of the Motor Carrier Act of 1980.—Section 19 of the Motor Carrier Act directs the Secretary of Transportation and the ICC to study the system of state regulations imposed upon interstate motor carriers and to prepare recommendations for Congress. State requirements range from a simple vehicle registration fee to a complex set of registration and tax requirements. The Department and the Commission divided the study workload according to each agency's expertise with the subject matter. The Commission was responsible for preparing recommendations for Public Law 89-170 (Federal law governing state public utility commission requirements for registration of interstate operating authorities) and intrastate economic regulations. Two series of public meetings were conducted and several interim reports have been published during the past 2 years.

The report has been submitted to Congress. It reaches the conclusion that, while the states have made progress toward more uniform requirements, movement has been slow. Programs proposed by groups of state administrators have been accepted by some jurisdictions, but rejections or modifications by others have stymied the progress of nationwide uniformity. The report evaluates the available options and makes specific recommendations. A copy of the Executive Summary is included in Appendix III.

Temporary authority and emergency temporary authority.—Since February 4, 1980, decisions on applications for both temporary and emergency temporary authority have been handled by six regional motor carrier boards, comprised of three members each. The transfer predates passage of the Motor Carrier Act of 1980, which for the first time added specific statutory language with regard to emergency temporary authority applications and established time limits within which the Commission must decide applications for both temporary and emergency temporary authority.

During fiscal year 1981, the six regional boards processed 14,053 TA applications and 12,161 ETA applications. During fiscal year 1982, the boards disposed of a total of 10,753 applications for temporary and emergency temporary authority, a substantial decline from the prior fiscal year.

The reasons for the decline in number of filings are two-fold. First, the state of the economy would appear to limit shipper opportunities for expansion into new markets and the resulting need for applications for temporary authority. Second, a number of carriers who in the past were frequent applicants for temporary authority have, since passage of the Motor Carrier Act, received grants of permanent authority for nationwide operations, thus eliminating need to apply for temporary authority. The types of carriers involved are food product haulers, heavy haulers and building material haulers.

The regions have been able to decide temporary authority applications well within the time limits prescribed by the Motor Carrier Act. The Act specified that TA's were to be decided within 90 days of filing, and ETA's within 15 days. For the first six months of fiscal year 1982, TA's were decided on an average of 34.4 days after filing, and ETA's 3.3 days after filing. These figures have remained relatively constant since transfer of the function to the field.

The Commission is considering new rules for simplified processing of TA's and ETA's (Ex Parte MC-67 Sub No. 8) and the extent to which notice should be given to existing carriers in ETA proceedings (Ex Parte No. MC-67 Sub No. 6). Disposition of these proceedings is expected in the near future.

FUEL REIMBURSEMENT PROGRAM

Since the Subcommittee has previously expressed interest in our fuel reimbursement program, an update might be helpful. By decision served October 8, 1981, the Commission instituted a new fuel reimbursement program. The Commission replaced the old revenue-based fuel surcharge with a new mileage-based program. The new system continues the intent and purpose of the old program, that is, to reimburse owner-operators for increases in the cost of fuel above January 1, 1979 levels; but it changes the method of payment. Under the old surcharge, the amount of compensation that was paid by the carrier to the owner-operator was computed by taking a percentage of the gross revenues of the load. The percentage amount varied with the price of fuel. The old fuel surcharge had the advantage of simplicity; however, because it was based on a percentage of gross revenues, it bore little relationship to the cost of transporting a shipment; the amount of owner-operator compensation was more a factor of the nature of the traffic, that is, highly rated commodities on which the shipper paid the highest shipping charges yielded the most in fuel surcharges. The fuel surcharge system was not equitable in many respects. Less-than-truckload shipments presented special problems.

In order to remedy such deficiencies, the Commission developed a fuel reimbursement program based on miles traveled rather than revenues. This more accurately reflects the costs involved in transportation and more closely ties the amount of reimbursement to the fuel consumed. The Commission's mileage-based formula provides for a compensation factor, expressed in cents per mile, which will rise or fall in one-half cent increments as the price of fuel changes. The compensation factor is based, in part, on a weekly survey of fuel costs across the country. To compute their fuel reimbursement, owner-operators multiply the mileage traveled on regulated carrier-related business by the Commission's currently effective fuel compensation factor.

Prior to the date the Commission's decision was to be implemented, the United States Court of Appeals for the Fifth Circuit stayed the effectiveness of the decision. The stay was subsequently lifted on January 18, 1982, and the new program is now in effect.

The minimum cents per mile fuel reimbursement figure was established at 14¢ when the program began. As the price of fuel declined in the second quarter of the year, the reimbursement factor fell to a low of 12.5¢. With the recent escalation in fuel prices, the compensation factor has begun to increase. On June 17, 1982, it rose to 13¢ and to 13.5¢ per mile effective June 29. The figure rose again on November 17, 1982, to 14¢ per mile. Further adjustments in the minimum fuel compensation figure will continue to be made whenever the actual cents per mile figure changes by a half cent or more. Changes are effective 10 working days after publication in the Federal Register.

To insure that carriers are in compliance with ICC fuel reimbursement rules, the Commission is pursuing an active outreach and enforcement program. A letter was sent to every carrier known to utilize the services of owner-operators fully explaining the new program. Further, compliance checks are being made in the field, owner-operators are being asked to complete a questionnaire describing to the Commission how their carriers are handling fuel reimbursement, meetings are being held at truckstops throughout the country, and complaints related to fuel compensation are being given priority. The fuel reimbursement program is one of the topics covered by the Commission in its portion of the Interagency Owner-Operator Conferences being held throughout the the country. This enables participants to better understand the new program. In addition, a number of individuals from various offices in the Commission, whose names and numbers appear in each Federal Register Publication involving the fuel reimbursement program, are on hand at Commission offices to answer inquiries from owner-operators, carriers, shippers, and other interested parties about the new method of compensation.

AGRICULTURAL COOPERATIVE EXEMPTION

Section 24 of the Motor Carrier Act of 1980 raised the tonnage limit on nonfarm, nonmember regulated commodities which agricultural cooperatives could haul from 15 to 25 percent of a cooperative's annual tonnage. With the increased percentage and the concern about sham cooperatives, Congress also provided the Commission with enhanced enforcement powers over agricultural cooperatives hauling nonmember freight.

A rulemaking has been initiated to correct the weaknesses in the present cooperative regulations and provide an improved monitoring mechanism to ensure that cooperatives are operating within the exemption. Final rules are pending full Commission action.

The provisions of the Motor Carrier Act of 1980 had little effect on the number of filings made by agricultural cooperatives to haul nonfarm, nonmember traffic or on enforcement actions involving unauthorized transportation by agricultural cooperatives. Both continue to occur at a normal rate.

This concludes my prepared remarks. At this time, we are considering further legislative recommendations regarding motor carriers. A legislative package was submitted earlier this year, on February 10, 1982. I am pleased to report that a number of changes we suggested have been incorporated in the Bus Regulatory Reform Act of 1982. Specifically, ICC regulation of the issuance of securities for motor carriers has been eliminated, and another provision of the legislation gives the Commission the authority to exempt merger, consolidation and acquisition of control transactions involving motor carriers of property from the applicable provisions of Title 49. The Commission believes the exemption provision will be extremely helpful in providing flexibility and permitting expedited implementation of transactions where Commission consideration is not necessary.

Further legislation initiatives are underway. We intend, as a minimum, to propose a broad motor carrier exemption provision along the lines of the Staggers Rail Act. In addition, the Commission is taking a hard look at all facets of motor carrier regulations. We intend to work closely with the Department of Transportation, OMB, and Senate Commerce Committee staff in developing new legislative initiatives, including a revised "fitness only" proposal. Also under consideration will be the question of whether to recommend the sunset of ICC motor carrier regulation.

The Commission will continue its effort to implement the Motor Carrier Act in accordance with Congressional intent and the National Transportation Policy. We will, or course, keep you apprised of further developments and legislative recommendations.

I will be pleased to answer any questions you may have.

[The following information was subsequently received for the record:]

ICC RESPONSE TO THE STATEMENT OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA ON OVERSIGHT OF THE MOTOR CARRIER ACT OF 1980

Thank you for the opportunity to submit comments in response to the written statement of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

Before turning to the specific actions requested by the Teamsters, I would like to respond briefly to their general allegations. Initially, I would emphasize that, as indicated in my testimony before the Subcommittee on December 14, 1982, the Commission is extremely concerned about the financial condition of the motor carrier industry. We are committed to assisting in finding a solution to the industry's financial difficulties. In this regard, we seek the same objective as the Teamsters Union, i.e., a viable trucking industry. However, we do differ on the root cause of the problem. While the Teamsters feel that the Commission's implementation of the Motor Carrier Act is to blame, we believe that the recession is the primary cause of the industry's declining financial performance. (See the Commission's December 14, 1982 statement and the GAO Report, dated June 11, 1982, "Effects of Regulatory Reform on Unemployment in the Trucking Industry.")

Contrary to the Teamsters' allegations, we believe the Commission is administering the Act in accordance with the intent of Congress. In most instances the courts have upheld our interpretations of the Act. In addition, in response to an adverse decision in *ATA* v. *ICC*, 659 F.2d 452 (5th Cir. 1981), even though the Commission petitioned for a writ of certirari in that case, we issued a notice invalidating certain rules and interim procedures governing motor carrier entry, pending a decision on our appeal. We have been complying with the 5th Circuit's decision, and we will continue to comply, pending the outcome of the Supreme Court's review.

Turning now to the specific issues raised, we will discuss them seriatim.

1. "Before issuing a certificate authorizing motor carrier service, the Commission should be certain that the applicant is physically and financially able to provide service coextensive with the certificate of authority and has not violated the Commission's rules or DOT's safety and insurance regulations. The Commission should also require evidence that the proposed service will serve a useful public service responsive to a public demand or need. In all of its actions, the Commission should comply with the National Transportation Policy (Section 10101), including its requirements to encourage fair wages and working conditions; to enable carriers to earn adequate profits, attract capital and maintain fair wages and working conditions."

The Commission currently does consider these issues in application cases. The transportation policy is a guiding principle for the Commission in making the necessary findings under 49 U.S.C § 10922, the motor common carrier entry provision of the Motor Carrier Act.

With regard to applicant's financial ability "to provide service coextensive with the certificate of authority," the Commission, in 1980, deleted the requirement for submission of financial information in connection with motor carrier filings after expressing great doubt about the past effectiveness of examination of this type of information and after noting that many new entrants start small and "survive just on the basis of hard work, an asset that cannot be portrayed in balance sheets." (Ex Parte No. 55 (Sub-No. 43), "Rules Governing Applications for Operating Authority," 364 I.C.C. 508, 539–41. In that decision, however, the Commission emphasized that it would continue to examine any financial activity which might bear on the carrier's treatment of its customers.

The overall issue of fitness continues to be a critical consideration. It is so important that I recommended to the Congress that we move to a fitness-only test for all motor carriers applications. As I indicated in my testimony, we intend to work closely with the Department of Transportation and other Representatives of the Administration in developing new legislative initiatives.

Presently, the Commission does verify the fitness of carriers. This past September, I signed a "Memorandum of Understanding and Agreement" with Secretary Lewis. This agreement formalized arrangements for joint ICC/DOT sharing of information, direct computer access by ICC staff to DOT safety data, and DOT participation in ICC safety-related fitness and revocation proceedings. The agreement, a copy of which is attached, resulted from an extensive effort during the past 18 months by the Commission's Office of Compliance and Consumer Assistance and DOT's Bureau of Motor Carrier Safety to coordinate ICC and DOT regional and field activities.

2. "The Commission should adopt a policy that carriers shall be required to provide service on demand, coextensive with their certificate. As a corollary, the Commission should not issue a certificate to a carrier which exceeds the scope of that applied for or which exceeds the applicant's ability to serve within 90 days after issuance of the certificate."

As you are probably aware, this issue is pending before the Commission in Ex Parte No. MC-77 (Sub-No. 3) Oral argument in that proceeding was held and a comprehensive written record developed. A decision is expected in January or February of 1983.

With regard to the second part of the statement, the Commission's policy is to refrain from giving applicants more authority than they seek or for which a need has been shown.

3. "The Commission should commence and continue to monitor the operations of carriers to make certain they are fulfilling their common carrier obligation and are providing service to small shippers and small committees in their service area. Enforcement proceedings are needed as sanctions."

As mentioned in the previous answer, the question of whether the common carrier obligation should be modified is being addressed in Ex Parte No. MC-77 (Sub-No. 3), "Elimination of Certificates as the Measure of "Holding out." "

The Commission's enforcement program includes evaluation and follow-up on complaints that carriers are not providing the common carrier service that they hold themselves out to provide. Usually, this is accomplished administratively and, in the recent past, has rarely required enforcement action. As indicated in my testimony, complaint levels have sharply declined from pre-Motor Carrier Act levels, and I am not aware of any recent complaints that carriers are failing to abide by their common carrier obligation.

With regard to service to small shippers and small communities, a recent Commission study mandated by Section 28 of the Motor Carrier Act concludes that, where small community service has changed, it has generally improved and that the pre-Motor Carrier Act fear that carriers would abandon service to small communities has not materialized. In fact, the evidence suggests that small communities have actually benefited from the legislation. Thus, the need for expanded Commission enforcement of the common carrier obligation in this area does not appear justified, given the positive results. A copy of the "Small Community Service Study" is enclosed.

4. "The Commission should adopt a policy statement requiring that rates published by carriers (a) must be at or above fully distributed costs; and (b) shall not discriminate against any shipper within the scope of the carriers' certificate by affording shippers in one area lower rates than those available to shippers in another area."

Ideally, carriers would like to have rates that are above fully allocated costs. This may be possible during periods of prosperity. However, in a recession, rates at or above fully allocated costs may be too high to attract sufficient traffic to sustain operations. It is a well established economic principal that prices below full cost but above variable operating costs are beneficial to the carrier. Or policy must *not* be one which holds rates to a level that would require carriers to go out of business if a lower rate would allow them to continue operations. Such a policy would be contrary to the intent of the Motor Carrier Act.

In fact, a rate filed within the Act's "zone of rate freedom" cannot be suspended or investigated on the basis of its reasonableness, unless the Commission determines that the rate if unlawfully discriminatory or predatory. To be predatory, the legislative history indicates that the rate in question must involve the provision of below-cost service. Thus, our policy is to give carriers as much flexibility as possible, so long as rates are not predatory or unlawfully discriminatory.

To establish unreasonable discrimination under 49 U.S.C. § 10741(b), the complaining party must show a disparity of rates, competitive injury, and common control by the carrier over the rates charged to both the preferred and the prejudiced shipper. If the shipper demonstrates these three elements, the burden then shifts to the carrier to demonstrate that the difference is justified by differing transportation conditions. This procedure is the result of long-standing precedent, and we think it correctly apportions the burden of showing discrimination in a fashion that reflects each participant's control over necessary information. "Lawfulness of Volume Discount Rates By Motor Common Carrier of Property," 365 I.C.C. 711 (1982). See also, *Harborlite Corp.* v. *Southern Pac. Transp. Co.,* 364 I.C.C. 585 (1981).

Consequently, there are available remedies that can be pursued at the Commission for alleged discrimination arising under the provisions of Chapter 107 of title 49, and, also, existing rates can be challenged under the complaint procedures of Chapter 117. In addition, remedies are available under the antitrust laws.

The recent allegations of predatory and discriminatory pricing among motor carriers are being investigated in Ex Parte No. MC-166. Comments in that proceeding are due on January 15, 1983. We hope through that proceeding to gain a greater understanding of the current situation and determine the effects of the Motor Carrier Act on the pricing practices of the motor carrier industry.

5. "Every decision of the Commission implementing the Motor Carrier Act of 1980 explicitly shall consider and comply with the admonition in Section 3(a) that the Act is to be implemented with the least amount of disruption to the transportation system."

The Commission has attempted to implement the Motor Carrier Act without undue disruption to the transportation system. I have personally adopted an approach of "gradualism," and my voting record reflects this. We are charged, after all, with regulating all mode of surface transportation, and we must have a broad view of the transportation system as a whole in our regulation of the individual modes. Disrupting any one modes has an adverse effect upon all modes.

6. "The Commission should promptly ascertain and maintain on a current basis the total costs of owner-operators whose services are used by regulated carriers in providing service to shippers. These costs are required by Section 10701 to be included by the Commission in determining adequate revenue levels and by the National Transportation Policy (Section 10101). The Department of Agriculture publishes such costs on a monthly basis for owner-operators engaged in hauling agricultural commodities."

In 1978, the Commission asked for comments to determine the advisability of instituting a proceeding to investigate the costs of owner-operators. Comments were specifically requested on "what such a proceeding might produce in the way of specific relief." After studying the comments received in Ex Parte No. MC-71 (Sub-No. 1), "Consideration of Owner-Operator Cost and Impact on the Rate Structure," the Commission ultimately decided that an investigation was not warranted and discontinued the proceeding. While many of those comments favored institution of an investigation, the reasons given in opposition were persuasive. As the ATA cautioned, "owner-operator costs may be the most elusive of all costs within the motor carrier industry. [C]osts will vary, often to extremes, with each owner-operator, often without regard to revenues, commodities, or purposeful act of the owner-operators."

It should be pointed out, however, that the Commission has never, to our knowledge, refused to "authorize revenue levels" sought by carriers when rate requests are accompanied by carrier data which justifies the need to cover increased costs arising from leased vehicle operations.

7. "The Commission should implement Section 10527 by requiring written contracts for the movement of exempt commodities. The Commission has declined to require such contracts even though it has recognized in its fuel reimbursement program that owner-operators "are in a weak financial position and lack the bargaining power to improve this position." It was Congressional recognition of owner-operators' "weak bargaining position" that led to the enactment of Section 10527."

Following a series of hearings held in seven cities during January of 1981 and a review of the record of those hearings, as well as the results of the ICC's independent surveys, the Commission and the United States Department of Agriculture concluded that there are strong indications that the imposition of a standardized written contract could create serious difficulties for the fresh fruit and vegetable industry without any assurance of overcoming truckers' problems related to the issue.

The ICC and USDA believe the use of such a contract could result in diminishing the participation of independent truckers in this traffic, contrary to the intent of the Motor Carrier Act of 1980. Also, the Commission would, of necessity, become extensively involved in interpreting the language of such contracts, contrary to the Congressional intent to lessen regulation and contrary to the wishes of the majority of owner-operators. In this regard, it should be stressed that only 41 percent of the owner-operators interviewed during the Commission's independent surveys indicated they wanted their operations covered by a written contract.

Further detail on this issue and the joint decision of the ICC and USDA can be found in my December 14, 1982, testimony (pages 30–31) and in the final report of findings of the joint ICC and USDA task group regarding section 16. That report was transmitted to Congress on March 24, 1982. A copy is also included in Appendix III of the statement, submitted on December 14, 1982.

8. "The ICC and the Supreme Court held for more than 20 years that single source leasing of an owner-operator and his equipment constituted for-hire transportation requiring ICC authorization. By a policy statement in February of this year, the Commission overturned these decisions, stating that single source leasing is now private carriage. It assigned the Motor Carrier Act of 1980 as the reasosn for this radical departure from historic practice, despite the fact that the 1980 Act did not change the definition of private and for-hire carriage. The Act thus provides no authority for single source leasing. The Commission action transforming for-hire carriage to private carriage is contrary to the Congressional Findings (Section 3(a) of the 1980 Act), which direct the ICC not to exceed the power vested in it by the Interstate Commerce Act and to implement the Act with the least amount of disruption to the industry. At a minimum, consistent with its findings regarding the lack of bargaining power of owner-operators, the Commission should have required that single source leasing contracts should be in writing so that shippers' ability to exploit the "weak financial position" of owner-operators would be thereby reduced."

The change in policy referred to by the Teamsters involves the Commission's decision in Ex Parte No. MC-122 (Sub-No. 2), "Lease of Equipment and Drivers to Private Carriers," decided on February 9, 1982. The decision, which had been scheduled to become effective on March 23, 1982, was stayed by the U.S. Court of Appeals for the Eleventh Circuit, pending judicial review. The stay is still in effect.

The proceeding reflected the stated intention of the Commission to reexamine the Commission's tests used to distinguish private from for-hire carriage and proposed (a) to focus primarily on the control exercised over a lessor, and (b) to repudiate the presumption that construed lessors to be for-hire carriers if their lessees are private carriers.

The decision stated: "What is at issue here is the ability of private carriers, like regulated carriers, to improve their overall efficiency by augmenting their fleets with equipment and drivers leased from owner-operators. The Commission's past policy toward such leases has precluded private carriers from using this potential source of fleet augmentation. By changing our policy in this respect, we will open up this additional source of fleet augmentation to private carriers, while at the same time opening up an additional source of revenues to owner-operators, who have been particularly hard-pressed by both the present economic recession and the rapid escalation of fuel prices over the past several years."

After studying the comments from over 200 persons and conducting an oral hearing in Washington, D.C. on October 14, 1981, the Commission concluded that single source leasing of an owner-operator and equipment is legal and would further the objectives of the Motor Carrier Act of 1980 by promoting competitive and efficient transportation services and allowing the most productive use of equipment and energy resources. It was the Commission's judgment that, as a result of the decision, owner-operators would have a broader market for their services and private carriers would have an additional source of fleet augmentation to meet their changing transportation needs. Such transportation will be considered private carriage conducted by the shipper, and as such, it will not be subject to Commission regulation.

Regarding the Teamsters' comment that "the Commission should have required that single source leasing contracts should be in writing . . .," the Commission decision makes it clear that the Commission has no authority to require that the lease agreement be in writing. As stated in the decision:

"*Whether the lease agreement is in writing.*—This is not an indispensable element of a valid contractual agreement, absent some applicable State law to that effect, and we have no authority to impose it on private carriers as we have in the case of regulated carriers which lease equipment from owner-operators or other carriers. However, the best evidence of whether a leasing arrangement is private carriage is a written lease. It follows that we will subject oral leases to more careful and detailed scrutiny than written leases."

The owner-operator, of course, has the right to insist on a written contract.

CONCLUSION

The ninth action, requesting an increase in the level of insurance, should be addressed by the Department of Transportation. Regardless of the level which is decided upon, the Commission will, of course, enforce the requirement that a carrier have the requisite insurance both prior to and after the issuance of a certificate or permit.

The final requested action, relating to the establishment of an employee protection program, is directed to Congress.

APPENDIX C.—MEMORANDUM OF UNDERSTANDING AND AGREEMENT BETWEEN THE DEPARTMENT OF TRANSPORTATION AND THE INTERSTATE COMMERCE COMMISSION

In the interest of assuring cooperation in providing for safe, adequate, economical, and efficient transportation of persons and property by commercial motor vehicle, particularly in the interest of necessary and comprehensive regulation of motor carrier safety and the safe transportation of hazardous materials, the Department of Transportation (DOT) and the Interstate Commerce Commission (ICC) agree as follows, subject to their respective statutory authorities. The execution of the terms of this agreement on behalf of the DOT will be through the Federal Highway Administration's Bureau of Motor Carrier Safety (BMCS). Wherever reference is made to BMCS it is intended to bind the DOT.

I. MOTOR CARRIER SAFETY FITNESS RATINGS

a. BMCS will provide ICC with an initial safety rating for all motor carriers seeking operating authority from the ICC. A description of those ratings is attached as an Appendix to this Memorandum of Understanding and Agreement.

b. The ratings will be included in the BMCS Management Information System and accessible through computer terminals linked to the System. The ICC, through its installed terminals at its headquarters and regional offices, will be linked to the BMCS System at no cost or expense to BMCS. The ICC requests for safety compliance ratings of all carrier applicants for temporary or permanent authority will henceforth be initiated through the computerized Management Information System at no cost to ICC.

c. If there is a prolonged operational shutdown of the computerized system, the ICC office requiring the rating information may initiate the request by telephone to the BMCS Headquarters, in Washington. Upon proper identification of the request-er, the rating will be determined by manual review of the carrier's file and provided as soon as practicable.

d. The ICC shall maintain an accurate record of the number of requests made for safety ratings, and shall transmit the totals monthly to BMCS.

e. Written confirmation of all "unsatisfactory," "conditional," or "insufficient information" ratings under paragraph "b" above can be obtained by telephoning a request to BMCS Headquarters in Washington.

II. FITNESS DETERMINATIONS AND GRANTS OF AUTHORITY

a. Temporary Authority:

1. Before finding a carrier fit to operate in interstate commerce, the ICC shall request a safety rating from BMCS concerning that carrier.

2. If the BMCS rating is "unsatisfactory," operating authority will not be issued by the ICC unless there is a particularly urgent transportation need determined by the ICC to outweigh safety considerations.

3. If the BMCS rating is "conditional" or "insufficient information," the ICC may grant the operating authority. The ICC may impose conditions including compliance with the Federal Motor Carrier Safety Regulations (FMCSR) and the Hazardous Materials Regulations (HMR). In the event of noncompliance with these regulations, BMCS may submit a recommendation to the ICC for revocation of temporary authority, and the ICC may revoke the authority without further proceedings.

b. Appeals from Regional Motor Carrier Board Decisions:

1. When a carrier applicant files an appeal from a Regional Motor Carrier Board decision denying temporary authority for reasons of applicant's safety record, the ICC will immediatley provide a copy of the appeal to BMCS for comment and recommendation.

2. Upon receipt of the appeal, BMCS will:

(a) Review the claims made by applicant on the appeal.

(b) Verify the accuracy of its initial rating.

(c) Provide comments and recommendations to ICC which may include:

i. Results of a new safety audit of the carrier's facilities.

ii. Negotiation with the carrier of a compliance agreement upon which a conditional rating may be based.

iii. Refutation of the carrier's claims and justification of the denial fo the petition.

iv. Acknowlegement of changed circumstances, or passage of time without evidence of noncompliance, which warrant reconsideration of the denial.

(d) Any comments and recommendations by BMCS will be submitted within the time allowed for replies to appeals under the ICC's Rules of Practice applicable to temporary authority applications, or such other time as the ICC may determine is appropriate in order to meet statutory time limitations. The Commission's decision will be based upon statutory standards irrespective of negotiations.

c. Permanent Authority:

1. If BMCS is not satisfied as to the safety fitness of a carrier applicant for permanent authority, it shall, within 45 days from the date the application is published in the Federal Register, file a petition for intervention setting forth generally the nature of the evidence it will present in support of its position, and shall request an oral hearing.

2. A copy of the BMCS petition will be served upon the applicant by BMCS. Applicant may respond within 60 days from the date the application is published in the Federal Register.

3. If deemed appropriate, the ICC will assign the application for oral hearing, which shall be held as soon as possible.

4. If no petition for intervention is filed by BMCS within the 45-day period following publication, the ICC will determine the carrier's fitness based on its entire record including the safety rating made available through the BMCS Management Information System.

d. Revocations;

1. Under its authority, the BMCS conducts Motor Carrier Safety Proceedings against carriers found to be in violation of the Federal Motor Carrier Safety Regulations. These proceedings may result in compliance orders binding the respondent carrier to safety performance requirements.

2. Upon determination by BMCS that a compliance order has been violated, it may petition ICC to revoke or suspend the carrier's operating authority.

3. Proceedings by ICC on BMCS petitions of revocation or suspension will be conducted under the provisions of 49 U.S.C. § 10925 in accordance with ICC Rules of Practice.

e. Hearings:

1. When an application for permanent authority to which BMCS is a party is set for hearing by the ICC, BMCS will be represented by FHWA attorneys.

2. Evidence at such hearings will, to whatever extent practical and consistent with legal requirements of due process, consist of inspection and investigation reports duly authenticated by BMCS, including carrier records, or copies thereof, annexed to reports as exhibits. The intent of this paragraph is to mimimize the need for personal appearance by BMCS investigators.

f. BMCS Participation in Hearings at the Request of the Office of Compliance and Consumer Assistance (OCCA):

1. Whenever the issue of safety fitness is raised by the ICC's Office of Compliance and Consumer Assistance (OCCA), BMCS will provide assistance to OCCA in presenting safety evidence to the Commission.

2. The provisions of II(e)(2) above also shall apply to such proceedings.

III. INFORMATION SYSTEMS

a. ICC and BMCS agree to assist one another in achieving information systems that are complete, accurate, consistent, compatible, and useful.

b. ICC shall have access to the BMCS computerized MIS pursuant to paragraph I above.

c. ICC access will be accomplished through the use of the ICC docket number.

d. ICC shall provide BMCS a hard copy list, which shall be updated weekly, of all changes or additions to its Chaindex information system, i.e., carriers with operating authorities or those seeking such authority, together with addresses, current status, and ICC docket number, at no cost to BMCS.

e. When making inquiry of the BMCS Information Management System concerning carriers, the ICC representative shall note whether an ICC docket number appears. If not, or if the carrier is not otherwise identifiable in the BMCS system, an immediate telephone notification shall be made to the BMCS Headquarters of the name, address, city, state, zip code, and docket number of the motor carrier applicant.

IV. EXCHANGE OF INFORMATION AND JOINT ACTIVITIES

a. when an ICC employee in the course of his or her official duties of examination, inspection, or investigation under ICC authority, discovers matters which are beleived to be violations of law within the jurisdiction of DOT, such matters are authorized for communication to the appropriate DOT field office through the appropriate ICC field office.

b. Conversely, where a DOT employee in the course of his or her official duties discovers matters which are believed to be economic violations within the jurisdiction of ICC, such matters are authorized for communication to the appropriate ICC field office in similar manner.

c. Subject to guidelines to be established by our respective organizations, joint examinations, road checks, inspections, or investigations may be authorized for the enforcement of laws relating to transportation.

d. Employees of ICC and DOT who have personal knowledge of facts pertinent to any violation will be made available to testify as to these facts in an enforcement proceeding or other action.

e. The foregoing shall not be considered to vest ICC and DOT employees with any investigative or enforcement authority over functions not within the jurisdiction of their own organization. Moreover, it is understood that ICC and DOT employees shall not be required to specifically examine, inspect, or investigate for violations not within their own jurisdiction, nor shall they exchange any information if that exchange is prohibited by any applicable law, regulation, or executive order. The purpose of this proposal is to effect a spirit of cooperation so that violations are brought to the attention of the agency possessing jurisdiction.

V. COORDINATOR

The ICC and DOT will each appoint a coordinator to assure that the procedures described in this agreement are effectively and promptly carried out, and that any requirements for changes in the agreement or procedure established thereunder, and any related changes in programs or policies of DOT and ICC are brought to the attention of their respective agencies.

VI. PREVIOUS AGREEMENTS

This Memorandum of Understanding and Agreement is intended to supersede and supplant any previous agreements entered into between the two agencies relative to the same subject matter, including the Memorandum Agreement of April 3, 1967, together with amendatory letters thereto, the primary purpose of which was to provide continuity during the transfer of personnel and functions from the ICC to DOT pursuant to Public Law 89-670, creating the Department of Transportation.

For the United States Department of Transportation:

DREW LEWIS,
Secretary.

Date: September 6, 1982.

For the United States Interstate Commerce Commission:

REESE R. TAYLOR, Jr.,
Chairman.

Date: August 23, 1982.

APPENDIX

Standard safety ratings used by the Bureau of Motor Carrier Safety.

1. Satisfactory—records indicate no evidence of substantial noncompliance with safety requirements.
2. Unsatisfactory—records indicate evidence of substantial noncompliance with safety requirements.
3. Conditional—records indicate that carrier was determined recently to have been in noncompliance with one or more safety requirements, and is under review by BMCS.
4. Insufficient Information—there is no current information available to BMCS upon which to base a rating. This rating will automatically be elevated to satisfactory after one year from the date the rating is assigned if it has not, in that time, been changed to unsatisfactory or conditional.

Senator DANFORTH. Mr. Irwin Silberman.

STATEMENT OF NELSON J. COONEY, GENERAL COUNSEL, AMERICAN TRUCKING ASSOCIATIONS, INC.

Mr. COONEY. Mr. Chairman, I am Nelson Cooney, general counsel for the American Trucking Associations.

I would like to speak briefly before Dr. Silberman. The only purpose I am serving here is to submit a written statement of American Trucking Associations for the record. I believe you have copies of that statement.

I should say that what we are stressing here today is the economic and financial situation in the trucking industry, and the ATA statement goes to the overall trucking industry, the entire regulated motor carrier industry.

Dr. Irwin Silberman, a noted economist and financial consultant, has made several studies of the trucking industry and is zeroing in on the general freight carriers of all commodities. His remarks will be directed to that group. Our statement is 9 pages long; his is 31. He will summarize his.

I should also say that we have not analyzed the impact of the jolt the motor carrier industry would receive if the highway funding and increased taxes on heavy trucks were to be implemented, as you were discussing in the Senate today.

I would also like to ask that we be permitted to file some statements later for the record. In particular, since we stress the economic and financial condition of the industry, we did not get into the small community studies, and we have several comments to make about those studies and studies of our own that we would like to submit for the record.

Dr. Silberman is an economic and financial consultant and has studied that particular area of the industry that we find to be significant of the overall industry, so I would turn it over to him now.

[The statement follows:]

STATEMENT OF AMERICAN TRUCKING ASSOCIATIONS, INC.

American Trucking Associations, Inc., with offices at 1616 P Street, N.W., Washington, D.C., is a federation with affiliated associations in every state and the District of Columbia, plus thirteen national conferences. In the aggregate we represent every type and class of motor carrier operation in the country, both for-hire and private.

ATA appreciates the opportunity to present testimony to your Subcommittee. This marks the fourth time ATA has testified on the impact of Public Law 96-296, the Motor Carrier Act of 1980. In our previous testimony over the last year and a half, before both this Committee and the House Committee on Public Works and Transportation, we expressed our serious concern about the state and health of the trucking industry, particularly as it relates to the implementation of the Act by the I.C.C. Now, as the end of 1982 approaches, we must unfortunately reiterate that the state of the industry has not been reversed, but only worsened. While financial results for 1981 were the worst for the trucking industry in over 20 years, results for 1982 are stacking up as the worst in the industry's history.

The regulated trucking industry, plain and simply, is hauling freight for nothing. According to aggregate results for Class I and II common carriers through the first half of 1982, we are generating no profits. For all carriers, the operating ratio, operating expenses to revenues but with interest and income taxes still to be paid, stands at 99. Net profits amount to one-tenth of one percent of revenues, so meager as to mean zero. Furthermore, the general freight segment, which transports the bulk of the less-than-truckload shipments, is losing money. Early third quarter results for 171 major Class I common carriers show further declines in revenues, a further increase in the operating ratio and net income down by 78 percent from the third quarter of 1981.

The second and third quarters generally are the industry's stronger operating periods. Historically, income generated in the spring and summer serves to buffer and balance the typically more depressed first and fourth quarter earnings. The industry lost money in the first quarter of 1982, showing an operating ratio over 101. This year's fourth quarter has begun with general freight truck tonnage declining 6.4 percent from September of 1982 and off 13.3 percent from October of 1981. This year's fourth quarter, in short, is beginning with the industry in worse straits than last year's fourth quarter where the industry's operating ratio was over 102.

The depressed industry results must also take into account the 250 known carriers which have gone out of business, reduced service or declared bankruptcy. These carriers had generated revenues well over $2.3 billion and employed over 47,000 persons. Industry results would have been worse yet had most of these firms not shutdown.

We are well aware that profits of other industries are also down and business failure rates are up because of the recession. The trucking industry's concern is the exaggerated and absolute severity of the decline and deterioration in our industry. All Manufacturers have had a drop in their profit margin from 4.75 percent in 1981 to 3.8 percent in the first half of 1982. Our 1981 profit margin was 1.5 percent, less than a third of the All Manufacturers level—and has dropped to 0.01 percent. Over this same period, the All Manufacturers return-on-equity (ROE) dropped from 13.65 percent to 10.30 percent. Our ROE was half their level in 1981, 7.51 percent, and has dropped to no higher than 1.0 percent presently. At best, we are earning one-tenth of what other industries are making.

What accounts for the decline in our industry? Many will point to the recession, which does have a role. But if is not the recession alone which has decimated our industry. It is also the improper administration of the 1980 Motor Carrier Act by the I.C.C. Industrial production has declined but truck tonnage handled by the established firms in our industry has declined far more severely as excess capacity has developed and accelerated with the open entry policies of the I.C.C. Recession-related business declines produce earnings declines, but do they wipe out an industry's profitability altogether and create an environment where even future earnings potential is questionable? The trucking industry has weathered past recessions and emerged in fairly good shape. But there is no assured repeat of past performance in this current environment.

In addressing the problems of the trucking industry we must deal with a time span which encompasses but is neither limited to nor originated with the Motor Carrier Act of 1980. The I.C.C.'s thrust toward deregulation began in late 1977 and continues unabated today. The industry's state of deteriorating earnings also began in late 1977. The trucking industry's 1981 return on equity of 7.51 dropping to 1.0 percent in mid year 1982 reflects the annual slide in earnings from 1977. Our ROE that year was 15.27 percent, dropping to 14.51 percent in 1978, to 10.70 percent in 1979 and to 9.91 percent in 1980 before dropping even more serverely in the current period to where our return now represents virtually no earnings whatsoever. The trucking industry's continuing decline in earnings beginning since 1977 occurred prior to industry tonnage declines and prior to economic recession. We must conclude, therefore, that our declines have their foundation in the deregulatory actions of the I.C.C. which started in the late 1970's.

The goals of the 1980 Motor Carrier Act were primarily more competition and increased efficiency. These two goals are so constantly linked together in the Act that there exists an erroneous assumption that one follows directly from the other. While in theory perhaps they do, in practice they do not. We have seen competition increased greatly in the industry. The number of carriers regulated by the I.C.C. has grown from 17,204 in 1978, to 17,542 in 1979, to 21,345 in late 1980, to 23,243 in May of 1982 to, now, 24.037 in October 1982. To this must be added well over 800 notices of intercorporate hauling involving 8,500 subsidiaries; also increased competition from shipper associations, freight forwarders and a plethora of other competitors. But at the same time, we have not seen efficiency improved; in fact it has declined and it is one of the key reasons for the industry's present financial plight.

We do not question that eliminating gateway restrictions and liberalizing commodity restrictions have improved efficiency for many firms. We advocated many of these changes. We do not question that many individual carriers have improved their own efficiencies since the Act or entered the business assuming they could. However, has this enhanced the industry's efficiency or has this simply shifted efficiency among carriers—those improving efficiency doing so at the expense of the efficiency of other carriers?

In the broad sense of efficiency, we must look at the utilization of the industry's fleet of equipment to handle the shipping needs of the economy. As competition in the industry has increased, utilization has neither increased nor remained steady. It has declined for all segments of regulated carriers. The average load of general freight carriers was 13.6 tons in 1978 and had improved virtually every year up to 1978. Since 1978 it has steadily declined, to 13.4 tons in 1979, to 13.16 tons in 1980, to 12.87 tons in 1981, to 12.68 in this year's first quarter and down to 12.46 tons in the second quarter. An industry level this low has not bee experienced since 1965.

Each truck moving today is consuming essentially the same resources as in the past but is handling less freight. Put another way, trucking is now consuming more resources to handle a ton of freight than prior to the deregulation trend. This is not improved industry efficiency. Past recessions have not witnessed such severe drops in the average load. We assert the number of competitors is the cause; there are too many carriers competing for the "fixed" amount of freight. We argued this would occur prior to the Motor Carrier Act and it is indeed occurring now. The efficiency decline is unquestionably a result of excess capacity due to the misdirected application of the entry provisions of the Motor Carrier Act of I.C.C.

In this same vein we must address the issue of rate changes. The pricing practices of the motor common carriers of property since the Motor Carrier Act of 1980 have deteriorated into an unhealthy, destructive competitive situation which is harmful to both the motor carriers and the public. The fault lies with the I.C.C. for its failure to administer the rate-making provisions of the Interstate Commerce Act. Although the Motor Carrier Act of 1980 encourages innovative pricing with a view to increasing the number of price/service options, nothing in the 1980 law changed the provisions of the Interstate Commerce Act governing predatory, preferential and discriminatory pricing.

Few, if any, new pricing practices exist today that did not exist before passage of the 1980 law. But, the number of deviations from general tariffs has increased substantially. To the extent these deviations are lawful, they represent healthy competition. The trucking industry's concern is solely with the unlawful pricing practices which are prevalent today. These include volume discounting, aggregate tender discounts, promotional rates, and general independent pricing, where these rates do not cover their cost of providing the service.

The impact of this unlawful pricing is primarily twofold: (1) a prevention of the restoration of profitability in the industry, including the demise of numerous smaller carriers and a trend toward concentration in the general commodity freight segment of the trucking industry and (2) an unjustifiable benefit for the large shipper to the detriment of the small shipper.

Numerous examples of rate discount plans are cited by the I.C.C. and others as evidence that the Act is working. Again, we caution you not to be misled by these discount fares. Overall, industry "rates" have not declined. This is demonstrated by the fact that the 1981 average revenue per ton-mile of all Class I and II carriers of 13.67 was 2.23 higher than in 1979. By comparison, the same average revenue per ton-mile increased by 1.04 from 1977 to 1979, a two-year period before the Act. These relative changes are the same whether considering general freight carriers affiliated with rate bureaus or specialized carriers which price independently. Not only have overall industry rates not declined, they have escalated at a degree of change exceeding that prior to regulatory reform. The actual direction of price change is predicated on the actual change in operating costs, the decline in efficiency and the inability to improve productivity. Even with the recent rate changes, industry profitability has shrunk to nothing.

The I.C.C. has begun an investigation into pricing practices and the motor carrier industry will make every effort to provide the Commission with evidence to support our position that I.C.C. rate enforcement is vitally necessary. Our concern is that the individual number of the Commission will substitute their individual philosophical preferences for a clearly-defined regulatory statute.

The situation facing our industry today is serious and cannot be allowed to continue. An entire system of proven, dependable, efficient transportation is in jeopardy. The recession is but one factor in decreases in motor carrier business, both in tonnage and revenues. A far more important factor is the manner in which the Interstate Commerce Commission is administering the Act; or to put it more accurately, the manner in which the Commission is failing to administer the Act.

STATEMENT OF IRWIN H. SILBERMAN, IRWIN H. SILBERMAN & ASSOCIATES, INC.

Mr. SILBERMAN. Thank you, Senator Danforth, Senator Packwood, members of the subcommittee.

My name is Irwin Silberman and I am an economic and financial consultant in private practice. I have in the past 14 years conducted numerous studies of the economic and financial position of the motor carrier industry and, in particular, of the general freight motor common carriers. I appreciate the opportunity to appear before the committee.

As Mr. Cooney has indicated, I have prepared a 31-page statement which I hope will be submitted for the record, and I would like to briefly summarize that statement.

The study of the motor carrier industry, and specifically the motor common carriers, leads to a picture of an extremely fragile industry, an industry whose financial position has deteriorated disproportionately in recent years. With regard to current data, for the first 9 months of 1982, revenues are down. Profits for the motor carrier industry on revenues of approximately $14 billion will, at the very best, be zero and are likely to be negative.

Our analysis indicates that the lack of profitability and losses are widespread and apply across all sizes of carriers, both large and small. Indeed, with regard to that point, of the 10 largest carriers on December 31, 1981, 1 has already gone bankrupt and 5 of the remaining 9 are operating for the first 9 months of 1982 at an operating ratio in excess of 100.

An operating ratio in excess of 100 means that operating revenues are inadequate to cover even operating expenses, and that is before the deduction of interest. So you are talking about losses of a high order of magnitude in this industry. Those are the results of the largest carriers. I will address myself to the results of the small carriers in a few moments.

My analysis of the financial position of the carriers leads me to make several general observations which I would like to share with you. The first is that 1982 is the fourth successive year of earnings decline for the general freight carriers. It is not surprising to have heard Chairman Taylor indicate that carriers which are losing money today also lost money in 1979 and 1980. In fact, the decline, the recession, if you will, of the motor carrier industry began in 1979, not in 1981.

Second, profits in the last 2 years have been virtually nonexistent. I indicated a few moments ago that for 1982 they will be zero or perhaps negative. In 1981, when industry in general earned a return on equity of 13.3 percent, this industry earned a return on equity of 5 percent.

Third, as I indicated, this lack of profitability is a widespread phenomenon and has affected all sizes of carriers. The large carriers even in 1981 did quite poorly. The smaller carriers, which I will define as all but the top 10, accounted for 60 percent of the industry in 1981, and earned a return on equity of 1.55 percent.

In addition, Mr. Chairman, Senator Packwood, since 1979, general freight carriers accounting for 14.1 percent of the revenues have gone out of business. My studies indicate that carriers accounting for another third of industry revenues are candidates for failure. These are carriers that have sustained operating ratios above 97 for the years 1979, 1980, 1981, and now 1982.

So you are talking about failing carriers—and I will not count carriers—I am not sure that that is the meaningful number. The point is that half of this industry is in a situation where the carriers themselves are candidates for failure.

Further, as a consequence of these phenomena the market share of the leading carriers has increased, and it has increased dramatically. In 1982, I estimate that the share of the 10 largest carriers will be 42 percent on a national basis, up from about 34 percent in 1976.

Now this increase in market share has occurred not so much because of the growth of the large carriers; it has occurred because the industry as a whole has failed to grow.

Finally, my analysis indicates that given the lack of profitability, given the lack of cash flow, given the reluctance of lenders to lend to this industry, of investors to invest in this industry, given the inability of this industry to go to capital markets, it is unlikely, if additional deterioration occurs, that this industry will be able to participate fully in an economic recovery.

I would add that from a more general point of view, given what is happening in this country with regard to defense concerns, it is amazing to me that such deterioration is permitted to occur. There needs to be consideration given to the consequences of adding additional pressures which will adversely affect this industry, given the basic need to maintain and support and strengthen the transportation infrastructure in this country.

I would like to share with you in my remaining time some specific points of which I believe Mr. Swinburn and Chairman Taylor may not be aware, and which I believe and hope will be taken into account in your deliberations as you consider the appropriate actions for this industry.

First of all, the operating revenues of the motor common carriers have been stable for the last 5 years. They have not grown or have hardly grown at all. In the years 1976, 1977, and 1978, they grew robustly. They have remained at a constant level for the last 5 years; 1982 will actually show a decline.

Given what we know about inflation during the period 1979, 1980 and 1981, we are talking about a declining volume of activity which has been carried by the motor common carriers of general commodities. This decline began in 1979, not 1981, subsequent to the passage of the act, and it is coincident with what I believe was administrative deregulation by the Interstate Commerce Commission, which began in late 1978 and was carried on in 1979 and 1980.

Second, operating income of the motor carriers peaked in 1978 and has declined in each successive year. Third, interest expense is unbelievably high. In 1981, interest expense of the motor common carriers was almost 50 percent of operating income. It is no surprise, then, that the return on equity was virtually eliminated.

In 1981, $161 million of net profit was earned by this industry on $15 billion of revenues. The disaster, Mr. Chairman, Senator Packwood, is widespread.

In 1982, the top 10 carriers for the first 9 months of the year have an operating ratio of 97.7. I am aware that there are one or two carriers that are earning and experiencing operating ratios in the low 90's, but one or two carriers doth not a trucking industry in the United States make.

[The statement follows:]

STATEMENT OF IRWIN H. SILBERMAN

Mr. Chairman and members of the Subcommittee: My name is Irwin H. Silberman and I am an economic and financial consultant in private practice in Potomac, Maryland. I have participated in numerous studies of trucking industry finances over the past fourteen years.

I very much appreciate the opportunity to present to this Subcommittee the highlights of my analysis of the recent earnings performance and financial position of a major segment of that industry, the motor common carriers of general commodities.[1] In 1981, those carriers accounted for $15.3 billion of operating revenues.

Study of the motor carrier industry leads to a picture of an extremely fragile industry, one whose financial health has deteriorated disproportionately in recent years. Moreover, very current data indicate a continuation of that decline; for example, it is unlikely that there will be any motor carrier profits when the full year 1982 results of operations are tallied.

Specifically, the major findings of my analysis are:

A. The year 1982 marks the fourth successive year of economic recession for the industry. The duration of the motor carrier downturn far exceeds that experienced by other industries.

B. The severity of the decline is such that trucking profits have been virtually eliminated. Motor carriers experienced a composite after-tax return on equity of 5.0 percent in 1981, and will likely show either a zero or negative return in 1982. These returns should be compared to the return on equity of 13.3 percent experienced in 1981 by industry generally.

C. The deterioration and virtual elimination of general commodity trucking earnings is seen to be a generalized phenomenon, affecting all sizes of carriers, and refuting the myth that some groups of carriers are immune to the effects of the current changes.

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[1] For the purposes of this statement, trucking industry or motor carriers should be read as motor common carriers of general commodities.

D. Since early 1979, carriers representing 14.1 percent of industry revenues have gone out of business; studies indicate that carriers accounting for an additional 35.4 percent of revenues are candidates for failure.

E. The market share of the very largest motor carriers increased significantly in recent years, and rose further in 1982. Though the performance of these carriers has exceeded that of the industry composite, earnings levels of these carriers are far from adequate. In fact, of the top 10 carriers ranked on December 31, 1981, five completed the first nine months of 1982 with operating expenses in excess of revenues, and one went bankrupt.

F. Taken together, the results of the study raise important questions as to the continued viability of the motor common carrier industry. In particular, it appears that when the economy finally recovers, the industry will have difficulty financing needed new and replacement equipment.

The precarious position of the industry has developed primarily as a consequence of the interaction of deregulatory pressures (both administrative and legislative) with the effects of the current severe economic downturn. This statement makes no attempt to quantify the degree to which each of those forces has contributed to the observed deterioration. Rather, its purpose is to demonstrate the extent, severity and generalized nature of the industry's loss of financial viability.

In my judgment, the trucking industry is presently unable to withstand additional pressures which would adversely impact upon its financial position. Added deterioration will likely mean the inability of the industry to meet fully the demands of the economy during the process of economic recovery. Any additional pressures upon he industry would also be inconsistent with the need to strengthen the nation's transportation infrastructure in the face of rising defense concerns.

I. TRENDS IN MOTOR CARRIER EARNINGS

The industry

Our attention in this statement is focused upon a group of 288 general freight motor common carriers,[2] for which consistent financial data are available for the period 1976–1981. This national data base has been developed and is currently maintained for the industry by the international public accounting firm of Arthur Andersen & Co. In 1981, that group of carriers accounted for operating revenues (sales) of $15.331 billion.

The data analyzed are primarily drawn from "consolidated" reprts, which reflect not only the operations of the carriers themselves, but also the results of their transportation-related affiliated companies. These data are available on a national basis beginning in 1976.[3] Appendix A provides summary consolidated industry data for the 1976–1981 period.

Revenues

Figure 1 demonstrates that growth in operating revenues of the general freight motor carrier industry all but came to a stop in 1978; after two years of robust (in excess of 16 percent per year) growth in 1976–1977 and 1977–1978, revenues have been virtually constant over the 1978 to 1981 period. Given inflation, and the resultant general rate increases known to have occurred over the period, these data suggest a precipitous decline in the volume of business done by the general freight trucking industry beginning in 1979.

Data available for the first nine months of this year suggest that 1982 operating revenues will be at least 5 percent below 1981 revenues.

The general freight motor carrier industry, then, is seen as completing its fifth successive year of approximately identical operation revenues. The implications of this inability to keep pace with inflation and with business in general are described below.

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[2] As of 1978.

[3] As a result of administrative and legislative elimination of entry restrictions into common carrier trucking, the carriers in 1980 "wrote-off" most of the cost of the intangibles (operating rights) which appeared on their books. Thus, at the end of 1979 the study group of carriers had $522.4 million of intangibles on their books; all but $49.7 million was written off as an extraordinary charge in 1980. Subsequent legislation permitted the tax deductibility of intangibles which were written off, resulting in extraordinary credits to income, primarily in 1981. Neither the charges nor the credits are included in ordinary income, so that the earnings results shown reflect only the operating circumstances of the carriers. Further, in order to insure year-to-year consistency in financial ratios and rates of return, all equity data shown in the Report are net of intangibles in all years (i.e., net equity is so-called tangible equity).

Operating income

Net carrier operating income is computed as operating revenues less operating expenses, and is therefore taken before both interest expense and income taxes.

Figure 2 shows that operating income peaked in 1978; operating income in 1981 was only at one-half the level achieved in 1978.[4]

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[4] Operating income in 1981 was actually below the operating income achieved by the carriers in the recession year 1975, despite the fact that 1981 revenues were almost double those in 1975.

FIGURE 1

OPERATING REVENUES

(In Billions of Dollars)

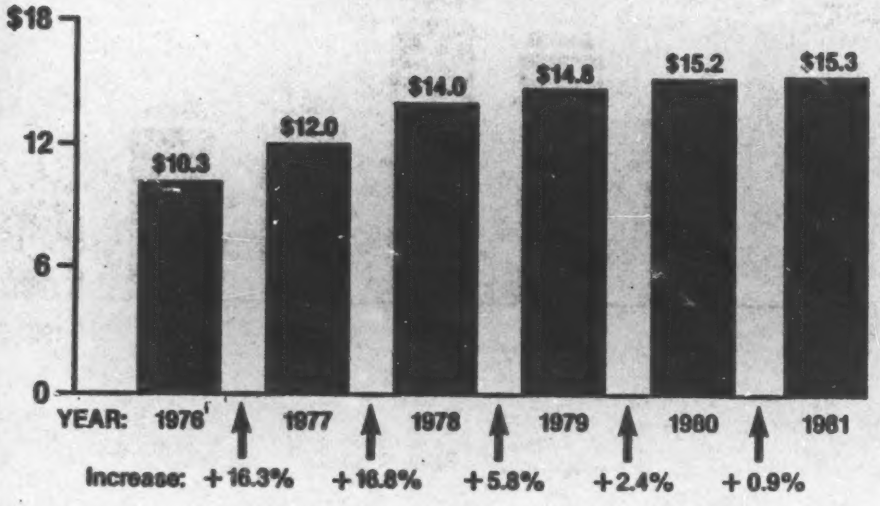


FIGURE 2

NET CARRIER OPERATING INCOME AND INTEREST EXPENSE

(In Millions of Dollars)

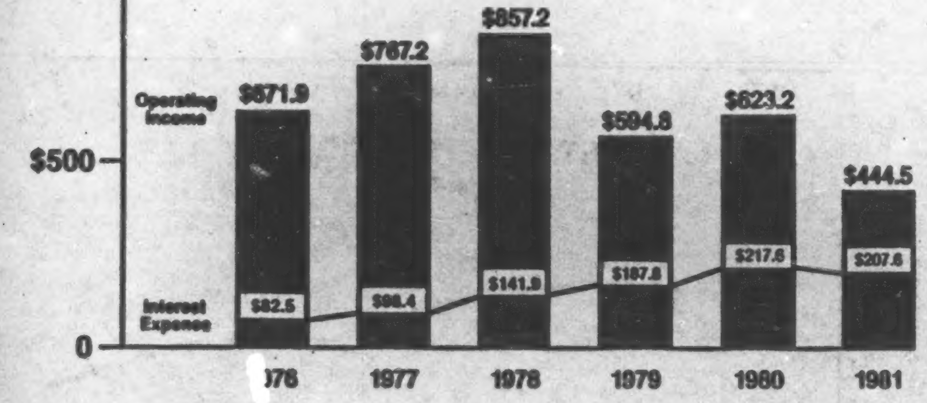


FIGURE 3

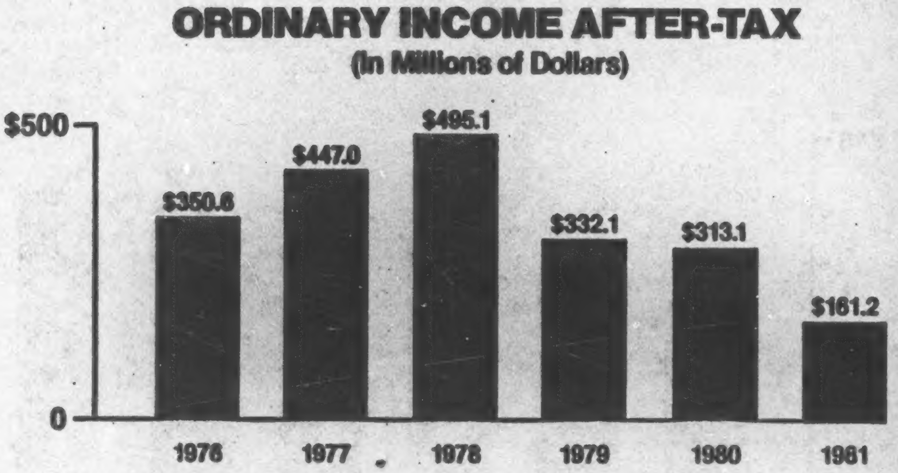


FIGURE 4

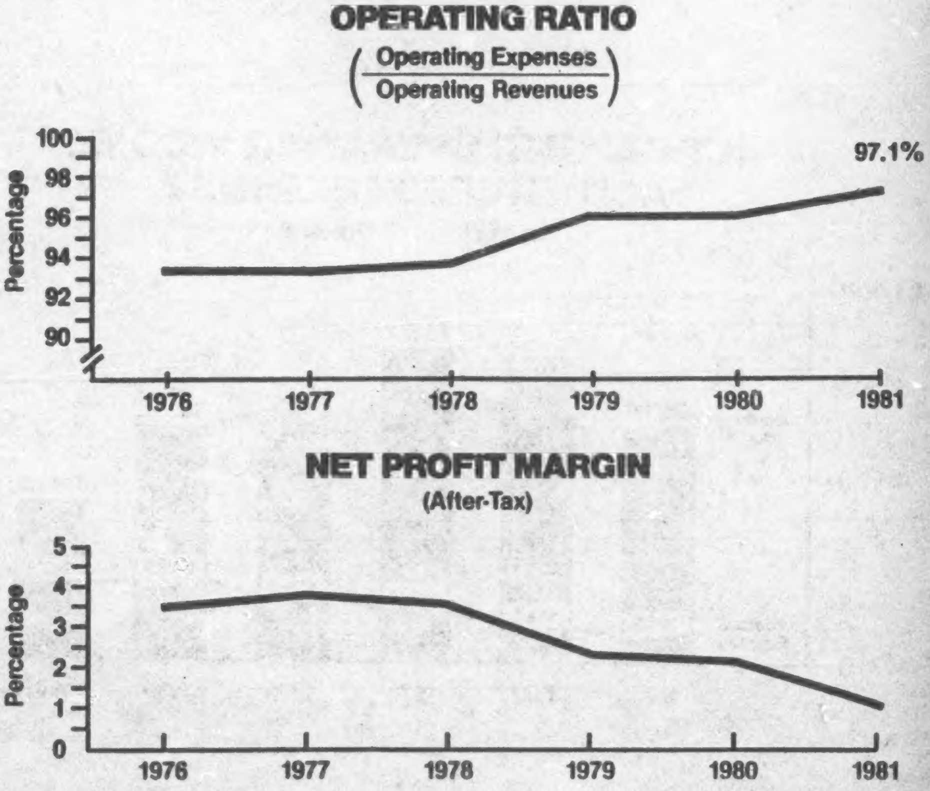


Figure 2 also presents data on interest expense paid by the carriers. Note that interest paid increased by a factor of 2.5 times over the 1976–1981 period (through long-term debt increased by a factor of only 1.4 times). This dramatic rise in the importance of interest expense, coupled with the above-referenced decline in operating income, significantly increases the share of operating income consumed by interest expense. Thus, in 1978, interest expense was 16.6 percent of operting income; in 1980, the proportion had risen to 34.9 percent. In 1981, interest expense paid by the industry was astounding 46.7 percent of operating income.

Ordinary income after tax

Figure 3 shows that ordinary income (after interest and taxes) peaked in 1978, and decreased in each subsequent year. It has not again achieved even the level earned in 1976, despite the fact that 1981 revenues were almost double those experienced in 1976. In 1981, $15.331 billion of revenues generated but $161.2 million of ordinary income.

The deterioration of both operating income and ordinary income after-tax are depicted in Figure 4. The upper panel show that in the 1976–1978 period, operating expenses consumed an almost constant proportion (approximately 93.5 percent) of operating revenues. The operating ratio increased markedly in 1979 and 1980 (to approximately 96.0 percent), and to 97.1 percent in 1981. That is to say, only 2.9 percent of revenues in 1981 was available for interest, income taxes, and profit. As we will see, the operating results for the first nine months of 1982 indicate an even further deterioration in operating performance.

The lower panel of Figure 4 relates ordinary income after-tax to operating revenues. As such, it reflects not only the decline in operating margins, as measured by the operating ratio, but also the increase in interest expense over the period. In 1981, the motor carrier industry, which has earned about 3.5 cents per dollar of revenues (sales) in the 1976–1978 period, had ordinary after-tax income equal to 1.0 cent per dollar of revenue. Based on the operating results for the first nine months of 1982, I expect the full-year 1982 results to approach a zero profit margin.

Finally, Figure 5 relates ordinary income after-tax to net (tangible) equity. Here again, we see the deterioration which has occurred since 1978. In 1981, the after-tax ROE for the motor carrier industry was 5.0 percent.

Balance sheet implications

The decline in the volume of business of the carriers, which we have inferred from the fact that revenues have been virtually unchanged in recent years, has been accompanied by a decline in carrier fixed investment in equipment and terminals. The data are shown in Figure 6, which reflects a constancy in the dollars of investment in 1979–1981. Given inflation, it is clear that there has been a decline in real investment devoted to providing motor carrier services.

FIGURE 5

RATE OF RETURN ON NET EQUITY
(ROE)

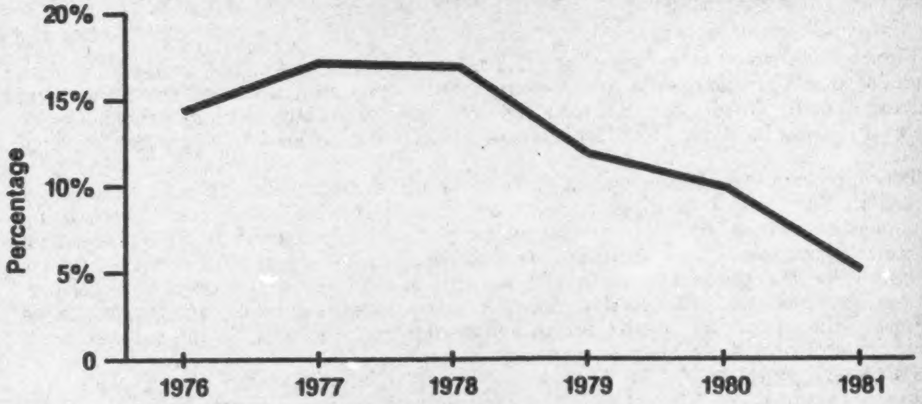
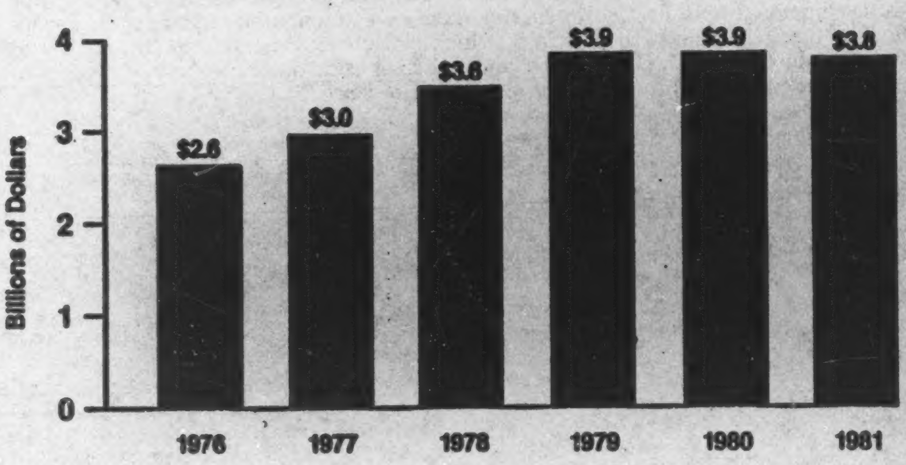


FIGURE 6

NET CARRIER OPERATING PROPERTY
(In Billions of Dollars)

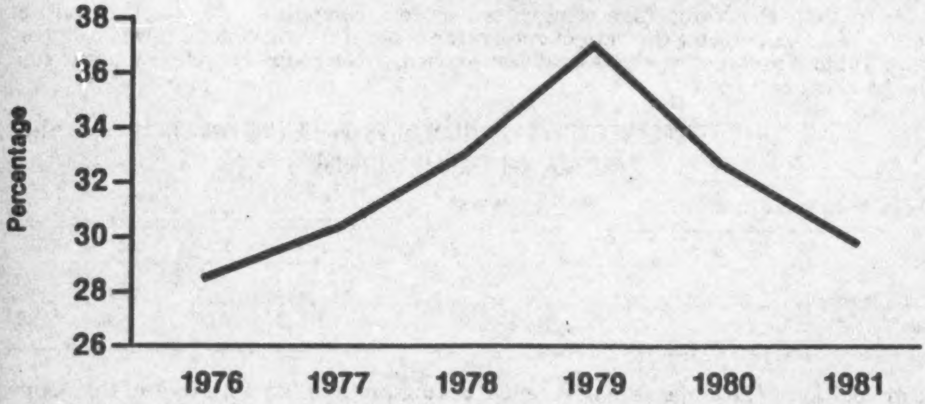


Interestingly, through carrier profitability peaked in 1978, operating property continued to grow in 1979. In order to finance growing levels of carrier equipment and terminals, given the insufficiency of internally generated cash flow, the carriers virtually doubled their long-term debt obligations from the end of 1976 to the end of 1979.[5] Since debt grew at a substantially faster pace than did net equity (79.7 percent for debt, versus 22.2 percent for net equity), the relative reliance on debt financing (the proportion of debt in the capital structure)[6] rose dramatically, and was 37.2 percent at the end of 1979. That is to say, for every dollar of long-term financing of the industry, 37.2 cents was fixed-charge debt. Figure 7 presents the data graphically.

Industry spending on equipment declined precipitously in 1980 and 1981. Internally generated cash flow, rather than being employed to maintain prior levels of investment spending, was used instead to reduce the debt incurred in years of high investment activity. Indeed, long-term debt declined by $338.5 million from the end of 1979 to the end of 1981. Concomitantly, the proportion of debt in the capital structure declined by more than 7.1 percentage points, as shown in Figure 7.

FIGURE 7

PROPORTION OF DEBT IN THE CAPITAL STRUCTURE



1982 results thus far

At this writing, comparative nine-month 1981 and 1982 data are available for a group of approximately 200 motor carriers which, in 1981, accounted for more than 90 percent of industry revenues. Those carriers, in 1981, had nine-month 1981 operating revenues of $10.728 billion of revenues, an operating ratio of 96.4 percentage points, and nine-month operating income (before-interest before-tax) of $384.7 million.

For the first nine-months of 1982, these carriers (less twenty-nine which went out of business through November 1982) accounted for revenues of $9.450 billion, a 1982 operating ratio of 98.74 percent, and 1982 nine-month operating income (before-interest before-tax) of $118.7 million. Operating income less interest expense for the entire industry for the first nine-months 1982 promises to be negative. Clearly, the disaster of 1981 is about to be overshadowed by the debacle of 1982.

II. COMPARISON WITH OTHER INDUSTRIES

How does the disastrous earnings experience of general freight trucking compare with performance in the remainder of the economy? After all, we anticipate that

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[5] The motor carriers have had virtually no access to external equity markets in recent years.

[6] Defined as long-term debt divided by the sum of long-term debt plus net equity.

"everyone" has been having problems recently, in the face of a severely depressed economy.

Table 1 shows selected aggregate data, for 1978, 1979, 1980, and 1981, for the "Value Line Industrial Composite." [7] The Value Line data indicate the following patterns on an economy-wide basis:

TABLE 1.—SELECTED VALUE LINE INDUSTRIAL COMPOSITE FINANCIAL RESULTS, 1978–81

[Dollars in billions]

	1978	1979	1980	1981
Revenues	$1,572.44	$1,865.11	$2,129.72	$2,305.74
Net profit (Before extraordinary items)	$74.33	$99.83	$98.68	$96.79
Equity (Less intangibles)	$515.40	$588.36	$664.41	$726.51
Return on net equity (In percent)	14.42	16.97	14.85	13.32

(1) Revenues or sales in the economy-at-large increased in 1979, 1980 and 1981, though general freight trucking showed virtually no revenue growth during those same years.

(2) Profitability in the economy generally peaked not in 1978 (as it did for the motor carriers) but in 1979.

(3) In 1980 and 1981, corporate profits did not grow; neither did they decline precipitously. Indeed, 1981 profits were essentially at their 1979 level, and were far above the level of profits achieved in 1978.

(4) In 1981, the Value Line companies earned a composite rate of return on net equity of 13.32 percent; the rate of return for general freight trucking was 5.03 percent! Table 2 presents a year-to-year comparison of the industry-wide composite and the trucking rates of return.

TABLE 2.—RATES OF RETURN ON EQUITY LESS INTANGIBLES, VALUE LINE INDUSTRIAL COMPOSITE AND GENERAL FREIGHT TRUCKING

[In percent]

	1978	1979	1980	1981
Value Line companies	14.42	16.97	14.85	13.32
General Freight Trucking	17.10	11.45	9.78	5.02

In addition to a comparison of recent trucking profitability with that of the economy generally, it is also instructive to examine how trucking has fared relative to individual industries. To that end, Figure 8 presents 1981 rates of return on equity for 19 industry groupings.[8] Note that in the entire array, there was only one industry grouping with earnings below trucking, and that was motor vehicles and equipment.

FIGURE 8.—*Rates of return on equity by industry—1981*

	In percent
All manufacturing corporations	13.7
Food and kindred products	13.6
Tobacco manufacturers	19.3
Textile mill products	9.4
Paper and allied products	12.1
Printing and publishing	14.9
Industrial chemicals and synthetics	12.9
Drugs	16.8
Petroleum and coal products	17.6
Rubber and miscellaneous plastic products	12.0

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[7] The Value Line Industrial Composite consists of more than 900 industrial, retail and transportation companies, and accounts for approximately 80 percent of all income earned by nonfinancial U.S. corporations.

[8] Derived from Federal Trade Commission, "Quarterly Financial Reports."

	In percent
Stone, clay, and glass products	8.8
Iron and steel	11.1
Nonprecious metals	10.2
Fabricated metal products	13.4
Machinery, except electrical	14.6
Electrical and electronic equipment	14.3
Motor vehicle and equipment	(0.7)
Aircraft, guided missiles, and parts	15.7
Instruments and related products	17.0
Other durable manufacturing corporations	8.2
All industry (including manufacturing, mining, retail, and wholesale)	14.0
Trucking	5.0

III. INTRAINDUSTRY PROFITABILITY DIFFERENCES

The data examined thus far indicate the motor carrier earnings peaked in 1978, and have declined in each subsequent year. They were meager in 1981, and will approximate zero in 1982. Not unrelated, operating revenues have not grown significantly since 1978, marking four years of little or no growth, and reflecting a substantial decline in the volume of business activity which began in 1979.

Our objection in this section is to gain an understanding of the intraindustry changes which have accompanied this industry-wide decline in volume and earnings. To do so, my analysis will focus on the ten largest motor carriers (ranked in 1981) and their earnings performance vis-a-vis the remainder of the industry. There is nothing sacred about my use of the top ten; similar conclusions would obtain had I defined large size by some alternative criterion. In order to appreciate recent changes, we briefly examine those large carriers in the period 1976–1978.

FIGURE 9.—SHARE OF GENERAL FREIGHT INDUSTRY REVENUES ACCOUNTED FOR BY 10 LARGEST CARRIERS

[In percent]

	Operating revenues	Operating income	Interest expense	Operating income less interest	After-tax ordinary income
1978	36.4	45.4	29.5	48.6	46.7
1977	35.2	45.3	31.7	47.3	47.8
1976	34.7	44.7	30.5	46.6	46.1

Figure 9 demonstrates that the largest carriers have traditionally experienced an above-average level of profitability. Thus, though they accounted for slightly more than one-third of industry revenues in the 1976–1978 period, they accounted for approximately 45 percent of operating income (operating revenues less operating expenses, before interest expense).

The largest carriers also exhibit a less than average dependence on fixed charge long-term debt financing, so that though these carriers earn 45 percent of operating income they account for only 30 percent of total interest paid. As a result, the ten largest carriers in the 1976–1978 period, though accounting for about 35 percent of industry revenues, accounted for 47 percent of operating income less interest expense.

FIGURE 10.—SHARE OF GENERAL FREIGHT INDUSTRY REVENUES ACCOUNTED FOR BY 10 LARGEST CARRIERS

[In percent]

	Operating revenues	Operating income	Interest expense	Operating income less interest	After-tax ordinary income
1981	39.6	55.1	28.1	78.7	83.6
1980	37.9	50.1	29.3	61.3	60.2
1979	37.7	47.5	26.7	57.1	57.2

FIGURE 10.—SHARE OF GENERAL FREIGHT INDUSTRY REVENUES ACCOUNTED FOR BY 10 LARGEST CARRIERS—Continued

[In percent]

	Operating revenues	Operating income	Interest expense	Operating income less interest	After-tax ordinary income
1978	36.4	45.0	29.5	48.6	46.7

Figure 10 continues the analysis above for the years through 1981. Note that in each successive year, the larger carriers accounted for dramatically increased shares (albeit of a smaller pie) of industry operating income. By 1981, the share of operating income of these top 10 carriers increased to 55 percent of the industry total (which was declining). Simultaneously, their share ot total industry interest paid actually declined (total interest paid by the industry increased sharply). The interaction of these two forces resulted in a dramatic increase of the share of industry operating income less interest of the ten largest carriers—to 78.7 percent in 1981. Viewed in an alternative manner, the broad based of the trucking industry, i.e., those carriers accounting for sixty percent of total revenues, achieved only twenty percent of the industry's profits. Since total industry profits were shown to have declined precipitously in 1981, it is to be expected that the broad base of the industry earned meager profits.

Indeed, the broad base of motor carrier industry in 1981 earned but $26.4 million, on revenues of $9.253 billion for a return on equity of 1.55 percent. Figure 11 demonstrates that most of the operating income of the "all other" group ($199 million) was expended for payment of interest!

FIGURE 11.—WHAT HAPPENED IN 1981?

	Operating revenues	Operating ratio	Proportion of debt	ROE	Operating income	Interest expense	OI less expense	Net ordinary income
Ten largest	$6,078,183	95.97%	24%	8.95%	$244,713	$58,311	$186,402	$134,776
All others	9,253,032	97.84%	35%	1.55%	199,789	149,317	50,472	26,394
Industry	15,331,215	97.10%	30%	5.02%	444,502	297,628	236,874	161,170

In contrast, only one-quarter of the operating income of the top ten carriers went for interest expense. Even so, the after-tax rate of return on equity of the largest firms in 1981 was only 8.95 percent—compared with 13.3 percent earned by the Value Line companies.

In summary, then, the below-average profitability of the "all other" carriers is magnified downward by the above-average debt reliance of those carriers. Figure 12 shows that when the deterioration in the operating ratio of the "all other" group is combined with the greater debt reliance and heavier interest burden of this group, the result is to effectively eliminate net income and return on equity (ROE). That is to say, the combination of reduced operating income, coupled with high interest charges, caused the ROE of the "all other" group to decline from 14.99 percent in 1978, to 8.38 percent in 1979, to 6.72 percent in 1980, to 1.55 percent in 1981.

FIGURE 12.—COMPARATIVE OPERATING RATIOS, TOP 10 AND "ALL OTHER" CARRIERS

[In percent]

	ROE		Operating ratio	
	Top 10	All other	Top 10	All other
1981	8.95	1.55	95.97	97.84
1980	14.00	6.72	94.58	96.71
1979	15.71	8.38	94.95	96.62
1978	20.40	14.99	92.37	94.76
1977	21.94	14.26	91.79	94.60

FIGURE 12.—COMPARATIVE OPERATING RATIOS, TOP 10 AND "ALL OTHER" CARRIERS—Continued

[In percent]

	ROE		Operating ratio	
	Top 10	All other	Top 10	All other
1976	18.70	12.51	91.63	94.49

Nine months 1982

The phenomenon whereby the net earnings of the broad base of the industry are eliminated, continues in 1982. I indicated earlier that the industry operating ratio for the first nine months of 1982 was 98.74. For the "all other" group, for the first nine months of 1982, it was 99.48, indicating virtually no operating income from which to pay interest expense. Ordinary income is substantially negative, as would be supposed.

The 1982 circumstance of the top 10 is not significantly better, reflecting a top 10 operating ratio of 97.74! One of the top 10 has already gone bankrupt. Of the nine surviving carriers, each and every one has poorer earnings in 1982 relative to 1981. Indeed, the operating ratios of five of those remaining top nine carriers exceed 100!

Market share

Table 3 indicates that though the revenues of the top 10 carriers did not grow substantially in recent years, their share of the total industry market did in fact increase. This phenomeon is explainable by the fact that industry revenues were virtually unchanged in the 1978-1981 period.

TABLE 3.—OPERATING REVENUES AND MARKET SHARE TOP 10 CARRIERS

	Revenues (thousands)	Market share (percent)
Year:		
1976	$3,583,244	34.7
1977	4,230,063	35.2
1978	5,100,268	36.4
1979	5,591,348	37.7
1980	5,763,023	37.9
1981	6,078,183	39.6
1982	(1)	[2] 42.0

[1] Not applicable.

[2] Estimated.

Data which I have examined for the first nine months of 1982 indicate a further increase in market share of the largest carriers this year. Based on those data, I estimate that the share of the ten largest carriers will be 42 percent of the national market in 1982. Table 3 indicates that most of the observed increase in market share occurred in the years of trucking industry profit deterioration.

IV. OUT OF BUSINESS CARRIERS

Of the 288 motor carriers that constituted the National Financial Data Base on January 1, 1979, 63 have gone out of business through November 1982. The financial characteristic of those carriers in 1978 are described in Table 4.

TABLE 4.—*Carriers that have gone out of business since January 1, 1979*

[Dollars in thousands]

	Percent
Financial status in 1978:	
Proportion of Industry Revenues in 1978	14.10
Operating Ratio	98.06
Rate of Return on Net Equity	4.67

	Percent
Proportion of Debt in the Capital Structure	55.96
Operating Income (before interest)	$38,449
Interest Expense	$28,495

Table 4 illustrates the necessity of paying close attention to low earnings rates and high "proportion of debt in the capital structure" as indicia of future financial staying-power. Note that 1978 was the year of peak earnings for the motor carrier industry. Depsite this fact, there were a significant number of carriers that were experiencing poor earnings and which were highly leveraged (not necessarily unrelated phenomena).

Though not every one of those carriers which experienced dificulties in 1978 subsequently went out of business, a large number in fact did, reflecting the further pressures upon those firms in the 1979–1982 period, as the total industry earnings environment also deteriorated. Note that with low earnings rates and high debt levels, interest expense of the firms which exited consumed three-quarters of operating income in 1978.

By way of compariosn, interest expense of the "all other" group of carriers in 1981 also consumed three-quarters of operating income, suggesting that the typical carrier in the industry is in no better shape than those carriers which have gone out of business since the present deterioration began.

On the theory that the average carrier is unable to stay in business over the long-run if it has sustained inadequate earnings over an extended period of time, I have determined the number of carriers which have experienced operating ratios of 97 or worse in both 1980 and 1981. Figure 13 shows summary 1981 data for the 109 carriers which met that criterion.[9]

I employed a 97 operating ratio cut-off because that ratio in 1981 resulted in a 5.0 percent ROE, clearly an inadequate earnings level. Carriers accounting for more than 35 percent of industry revenues met the criterion. The composite operating ratio of 101.9 implies that no positive operating income was available to those 109 carriers to pay $97 million of interest expense. Similarly, the reliance upon long-term debt financing is almost double that of the industry composite.

I do not mean to imply that every one of these firms will go out of business in the near future. But clearly each is a candidate for failure, and several carriers have already done so.

FIGURE 13.—*Financial characteristics of those 109 carriers which had operating ratios of 97 percent or more in both 1980 and 1981*

	(Dollars in thousands)
Revenues in 1981 (35.4% of industry revenues)	$5,421,338
Operating ratio (percent)	101.9
ROE (percent)	23.84
Proportion of debt (percent)	49
Interest expense (46.7% of industry interest)	$96,966

V. CONCLUSIONS

There are some who allege that the motor carrier industry is holding up well under the combined pressures of deregulation and a severe recession. These observers have not looked at the facts.

My study has made the following specific observations:

(1) The general freight industry has experienced five successive years of virtually identical operating revenues. When account is taken of inflation and resultant rate increases, that constancy of revenues implies a decline in business activity which began in 1979.

(2) Operating income (before interest) peaked in 1978, and has declined in each subsequent year.

(3) In the 1976–1978 period, interest expense was a relatively minor portion of operating income; by 1981, interest expense consumed almost one-half of all operating income earned by the industry.

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[9] There were 87 carriers, accounting for 31.1 percent of industry revenues in 1981, which met the criterion of a 97 or worse operating ratio in 1979, 1980 and 1981.

(4) In 1981, $15.3 billion of revenues generated only $161.2 million of after-tax ordinary income. After-tax income was a meager 1 percent of revenues, and only 5.0 percent of equity.

(5) Earnings performance has worsened even further in 1982. The operating ratio for the first nine months of 1982 was 98.74. Operating revenues are down sharply, and operating income less interest expense promises to be negative.

(6) Revenues in the economy at large increased in 1979, 1980 and 1981, though general freight trucking showed virtually no revenue growth during those same years.

(7) The 5.0 percent return on equity (ROE) of the motor carriers in 1981 should be compared with a 13.3 percent ROE earned by industry in general.

(8) Carriers accounting for 60 percent of industry revenues in 1981 (all but the top 10) earned only 20 percent of industry profits. That is to say, the broad base of the industry, on revenues of $9.253 billion, achieved a return on equity of only 1.55 percent.

(9) The ten largest carriers, though earning almost 80 percent of net income, achieved an ROE of only 8.95 percent in 1981—compared with an ROE of 13.3 percent for industry generally.

(10) The largest carriers experienced an operating ratio of 97.7 in the first nine months of 1982. One of the top ten has already gone bankrupt. Of the nine surviving carriers, each and every one has poorer earnings in 1982 relative to 1981. The operating ratios of five of the nine survivors exceed 100!

(11) Market share of the largest carriers has increased substantially during the years of business and earnings deterioration. I estimate that the market share of the top 10 carriers increased still further in 1982.

(12) Carriers (109) accounting for thirty-five percent of industry revenues have experienced inadequate earnings and exhibit high debt/equity ratios over a sustained period of time, and are additional candidates for failure. These carriers exhibit composite characteristics similar to those of the typical carrier which went out of business in the 1979–1982 period.

APPENDIX A.—SELECTED CONSOLIDATED FINANCIAL DATA GENERAL FREIGHT MOTOR COMMON CARRIER INDUSTRY

[Millions of dollars]

	1976	1977	1978	1979	1980	1981
Income items:						
Operating revenues	$10,326.9	$12,008.8	$14,024.4	$14,843.8	$15,200.4	$15,331.2
Operating income	671.9	767.2	857.2	594.8	623.2	444.5
Interest expense	82.5	98.4	141.9	187.8	217.6	207.6
Operating income less interest expense	589.4	668.8	715.3	407.0	405.6	236.9
Ordinary income before tax	617.4	706.2	755.5	466.2	481.2	333.4
Income tax on ordinary income	266.8	259.2	260.4	134.1	168.6	172.2
Ordinary income	350.6	447.0	495.1	332.1	313.1	161.2
Balance sheet items:						
Net working capital	$373.9	$390.2	$396.9	$363.5	$496.8	$430.2
Net carrier operating property	2,599.3	3,046.8	3,553.6	3,913.3	3,935.0	3,784.8
Investment in transportation	2,973.1	3,437.0	3,950.5	4,276.8	4,431.8	4,215.0
Long-term debt	956.5	1,153.4	1,424.4	1.718.7	1.570.1	1,380.1
Net equity	2,374.0	2,610.5	2,894.6	2,900.2	3,200.1	3,208.2
Total capital	3,330.5	3,763.9	4,319.0	4,619.0	4,770.2	4,588.5
Profitability rates (percent):						
Operating ratio	93.49	93.61	93.89	95.99	95.90	97.10
Net profit margin	3.39	3,72	3.53	2.24	2.06	1.05
Turnover on investment in transportation	3.47	3.49	3.55	3.47	3.43	3.64
Before-interest before-tax investment in transportation	22.60	22.32	21.70	13.91	14.06	10.55
Return on total capital (after-tax)	11.76	13.18	13.11	9.22	8.84	5.77
Return on net equity (after-tax)	14.77	17.12	17.10	11.45	9.78	5.02
Proportion of debt in the capital structure	28.72	30.64	32.98	37.21	32.92	30.08

Senator **Danforth**. Thank you, gentlemen.

What should we do?

Mr. **Cooney**. I would like to answer that for American Trucking Associations. We are in dire straits. We have come to you before and we came to the House, and we said that we are going to try to live with the Motor Carrier Act of 1980. We tried to live with it, but it is not being implemented the way it was written, the way we interpret it.

We think that the administrative deregulation that started in 1978 under former chairmen and has been continuing since the Motor Carrier Act of 1980 is devastating the industry, and we think it is not going backward, as DOT says, but it is a sensible regulation of the industry that is needed.

We need two things that we mention in here. We need some sort of control of illegal pricing practices that will help our industry.

Senator **Danforth**. That is the discount problem.

Mr. **Cooney**. Yes.

Second, if it is not too late—and some people contend it is—we need some sensible regulation of entry control because it is the over capacity that is causing the problem in the industry as well.

Senator **Danforth**. Now on the discount problem it is said that entry is so easy in trucking and that it is so easy for anybody to compete anywhere that the discount problem is just a nonproblem. Is that correct or not?

Mr. **Cooney**. The entry is easy into, perhaps, the truckload area of trucking, where the owner-operator can get authority in his own right. But in the LTL segment of the industry it is not quite so easy to get into the trucking business. There are substantial investments that have to be made.

The pricing practices are particularly hurting the LTL segment of the industry, and it is the discriminatory, preferential and predatory pricing that we are complaining about. We are not complaining about innovative pricing—independent actions that are legal. We are talking about those pricing practices where the carrier does not achieve even the cost of providing the service that he is providing.

We think the ICC is being derelict in its duties, and from its statement here today we get the impression that the ICC is simply going to look at the pricing practices and not necessarily do anything.

Senator **Danforth**. Does the fact that large as well as small trucking companies are hurting, does that tend to show that discounting is not particularly harmful for smaller truckers? I would think that if discounting were a problem there would be a pattern of the large companies doing much better than the smaller companies.

Mr. **Cooney**. Well, all companies are hurting right now. I do not know whether that follows logically or not. Perhaps Dr. Silberman could say.

Mr. **Silberman**. I do not believe one could infer that conclusion from the fact that all companies are hurting.

Senator **Danforth**. So you think that discounting is a problem?

Mr. **Cooney**. A tremendous problem in the industry.

Senator **Danforth**. And Mr. Silberman agrees with that?

Mr. **Silberman**. Yes. My analysis indicates that a substantial part of the decline in revenues that has occurred this year is a consequence of discounts—discounting—rather than additional decline in traffic. That is correct.

Senator **Danforth**. Also, I think you have said that the market share of large carriers is increasing?

Mr. **Silberman**. Yes, sir.

Mr. **Cooney**. It really is the concentration that we suggest that would result with a deregulatory movement.

Senator **Danforth**. So what is happening is that more people are able to get into the business and more people are getting into the business, I take it. However, the concentration of the available market is increasing in the larger companies. Is that right?

Mr. **Silberman**. The market, if you will, is not increasing. It is declining. The larger companies, to the extent that they have been better able to persevere, have been able to claim a larger share of the pie that, at the very least, is not growing and is, indeed, declining.

Senator **Danforth**. Does discounting account for that, or is there some other reason?

Mr. **Silberman**. I am sure that that is part of the reason, Senator. The lack of growth of carriers in general and of the market, of the revenues, and the inability of carriers to sustain years of loss is affected, obviously, by the discounting.

Senator **Danforth**. To what extent does the problem of the industry reflect the statute and to what extent does it reflect the way in which the ICC is interpreting and enforcing and operating the statute?

Mr. **Silberman**. It is very difficult to segregate those two effects. I would point out, though, that the decline which I am reporting began while the ICC was doing these kinds of things administratively. It is the combination of administrative deregulation in addition to the subsequent legislative deregulation and the effect of the economy, which altogether have impacted so adversely upon the industry.

Mr. **Cooney**. There are two major areas of regulation: pricing and entry control. We felt that under the Motor Carrier Act of 1980 there would be a legitimate looking at the public need to provide the service. With 6,000 new carriers in the field, there is extreme overcapacity. We do not feel that the ICC made any attempt to look at true public need.

So I think it is more the way the ICC implemented the act. It was a lessening of the entire regulation of days gone by, when you had the public convenience and necessity standard, but the public needs standard should mean more than it has meant to the ICC.

The second area of regulation where the ICC is derelict in its duties is the unlawful pricing practices that are permitted to continue. That has had a devastating effect on the industry. There were no changes in the Motor Carrier Act of 1980 in the standard for ratemaking relating to predatory, preferential, discriminatory pricing. There was an encouragement for price-service options, and that indeed has occurred.

But we really believe that it is more the fault of the movement of the ICC toward deregulation that started before the Motor Carrier Act and that was implemented to a greater extent than the Motor Act of 1980 loosened up.

Senator DANFORTH. You are saying that even given the Motor Carrier Act the ICC would, if it wanted to, have plenty of authority on both entry and pricing to alleviate the problems of your industry?

Mr. COONEY. Yes, sir, a lot of our carriers feel that there probably could not be written a law that would direct the ICC in another direction, when it wants to move in a certain direction, because of the administrative discretion that an agency is allowed by the courts.

Senator DANFORTH. Now you heard testimony earlier today that the real problem is the recession, it is not deregulation. Do you agree with that, Mr. Silberman?

Mr. SILBERMAN. Senator, I cannot quantify and say *X* percent of the problem is due to one and *Y* percent is due to another. But there is certain evidence which one needs to bring to bear. In the economy as a whole, corporate profits have not increased in the last 3 years, but they have not gone to zero either. They have in this industry.

The rate of return in 1981 for the motor carriers was the lowest rate of return for any industry in manufacturing last year.

Senator DANFORTH. But the industry is very sensitive to economic conditions, is it not?

Mr. SILBERMAN. That is correct.

Senator DANFORTH. And, as was testified by DOT, if there is an upturn in the economy trucking can look forward to an upturn as well.

Mr. SILBERMAN. That is an assumption, Senator, and I am not quite sure that that is valid. In prior downturns, for example, 1975, the duration of the downturn for trucking was 1 year. Trucking did indeed bounce back. But the sustained losses that this industry has suffered over a 4-year period and the destruction that has occurred to its very fabric, have changed the complexion of this industry. I think that it is naive to sit back and say well, in 1975 it bounced back, in 1970–71 it bounced back, and, therefore, it is going to bounce back again.

I do not think it follows this time.

Senator DANFORTH. So you think even if there is a recovery trucking is in serious shape?

Mr. SILBERMAN. Yes, sir, and I believe that the economy will be in serious shape because trucking will not be able to assume its proper role in that regard.

Senator DANFORTH. Senator Packwood.

The CHAIRMAN. Why won't trucking be able to resume its proper role? You have got a tremendous unutilized capacity right now. You have got trucks, new trucks, sitting that are not being used. Why won't you be able to handle it?

Mr. SILBERMAN. A part of that capacity is being cannibalized as carriers avoid the maintenance expense. Carriers do not have the access to the capital markets which would enable them to quickly respond with replacements. Equipment that is being used is being allowed to deteriorate because the carriers do not have the wherewithal—not when you have operating ratios of 100.

The CHAIRMAN. Let me ask you this: You heard the ICC statement about shipper complaints and small town service. In corroboration, objectively what I found, and substantively, do you have any quarrel with what they cite about small towns getting service and shipper complaints?

Mr. SILBERMAN. I have not studied that, Senator. I could not respond.

The CHAIRMAN. Well, the ATA used to keep very good track of that.

Mr. COONEY. We have two studies of that study, and we will submit those for the record.

Senator DANFORTH. You have two studies of that study?

Mr. COONEY. Yes.

Senator DANFORTH. I hope we do not give the two studies back to the ICC. I could see what will happen.

They will have four studies of the two studies. Did you have the second study because the first study did not come out right?

Mr. COONEY. We will provide you with both studies. The first one questions the methodology that was used, and the second one goes into the substance of it.

From our viewpoint, the problem right now is that you still have that common carrier obligation out there, that the ICC is hanging in the breeze. They have not concluded that proceeding, so the existing carriers are out there, to an extent, and serve those points because of their common carrier obligation.

Also, the economy is down and carriers are looking for any kind of freight, so they are willing to pick up all kinds of freight.

The CHAIRMAN. You are saying they still have to serve under the common carrier obligation to those small towns?

Mr. COONEY. That obligation has not been terminated by the Interstate Commerce Commission. Now granted that their enforcement capabilities are much less than they used to be, so I suspect that if a carrier decided not to serve it, he would not be chastized by the ICC because they do not have the enforcement capability.

But that proceeding is still pending at the ICC, and a lot of our carriers still operate under the impression that there is regulation by the ICC and that there is a common carrier obligation. But on top of that we also have the downturn in the economy and our carriers are scrambling for freight and are hauling a lot of freight that they might not necessarily haul.

The CHAIRMAN. So they will go to the small towns to pick it up because they can make some money?

Mr. COONEY. But we have also found that those rates have gone up considerably, and that is part of the result of that study.

The CHAIRMAN. But the small town shippers have not seemed to complain.

Mr. COONEY. Only in those two studies does it say they have not complained and, as I say, we challenge those two studies.

The CHAIRMAN. What should be the goal of the transportation system in this country? I mean, it clearly is not to sustain the profits of the truckers, per se.

Mr. COONEY. Certainly not.

The CHAIRMAN. What should be the goal?

Mr. COONEY. A stable and sound transportation system in this country so as to provide the transportation services that our economy needs, and that stability can come best through economic regulation, a sensible economic regulation.

The CHAIRMAN. Do you think that when the economy turns and big towns and small towns are doing well, if you had no regulation, the transportation system would fall apart, that there would not be companies that would serve markets that would be profitable?

Mr. COONEY. Markets that would be profitable, yes, companies will serve. If they are not profitable, the rates will go up substantially and there will be more difficulty for the shippers in those small communities because they have to pay more for it.

The CHAIRMAN. Well, they are paying more for it now, you say.

Mr. COONEY. Yes, they are.

The CHAIRMAN. And they are not complaining.

Mr. COONEY. We think they are complaining.

The CHAIRMAN. Repeat your statement again. I want to make sure. You do not think that short of a system of regulation and a thriving economy a truck transportation system would exist?

Mr. COONEY. Oh, I think it would exist under any kind of regulation or no regulation. I think the best transportation system is one that we have had up to this point in time. It is a coordinated system. The only way we can have that coordinated system is to have reasonable entry control, reasonable rate regulation, and collective action, and that collective action is only possible through an antitrust immunity that will permit that.

The CHAIRMAN. I want to come back to the small town service again because when you testified—not you, but when the ATA testified on the Motor Carrier Act, they just absolutely assured us that if it passed, the small town service would cease, and that has not happened.

Mr. COONEY. I disagree with part of that statement, because we feel that the trucking industry accepted the Motor Carrier Act of 1980 as a compromise piece of legislation. It was not deregulation. When we talked about small town community service deteriorating and rates increasing, we were talking about a scenario of total deregulation which we have not had yet and it remains to be seen what we will eventually happen.

The CHAIRMAN. Do you agree with Chairman Taylor that the fitness standard should be revised to be safety and insurance only?

Mr. COONEY. I believe the fitness standards should be revised and that safety and insurance are important. But another aspect should be public need, reasonably interpreted.

The CHAIRMAN. What do you think about the elimination of antitrust immunity for joint line ratemaking?

Mr. COONEY. I think if you eliminate antitrust immunity you will hurt the system in this country whereby today a small shipper in a small community is able to give his transportation package to a company which will transport it to a small community several States over by maybe two or three or four carriers, and that system is going to go by the board.

That was a good system for the shippers and receivers in this country.

The CHAIRMAN. I have no other questions.

Senator **Danforth**. Gentlemen, thank you very much.

[The following information was subsequently received for the record:]

American Trucking Associations, Inc.,
Law Division,
Washington, D.C., December 29, 1982.

Hon. John C. Danforth,
Chairman, Surface Transportation Subcommittee, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C.

Dear Senator Danforth: As promised at the December 14, 1982 hearing before your Subcommittee on Oversight of the Motor Carrier Act of 1980, I am enclosing several critiques of the small communities study presented to you by the Interstate Commerce Commission. The study was mandated by the 1980 law and was to focus on motor carrier service availability, quality and relative rate relationships for small communities. Enclosed herein is our analysis and critique of the service aspects of the ICC study. In addition, enclosed is a review of the rate level aspects of the ICC study which was conducted by Richard Trenery of Consulting Center Associates and S. Natarajan of the Middle Atlantic Conference.

After you have had a chance to examine the ICC study together with the enclosed critiques. I believe you will come to the same conclusion we have—the ICC study is virtually worthless in assessing the situation with respect to small community motor carrier service.

As I stated on December 14 before your Subcommittee in response to an inquiry from Senator Packwood, we have not found that small community service has appreciably deteriorated to date for several reasons. Below is a fuller explanation of those reasons for the record:

(1) While the Motor Carrier Act of 1980 liberalized entry controls, it retained the basic economic regulatory structure for motor carriage. The ICC is deregulating on its own as fast as it can, but it has not yet changed the common carrier obligation so as to set carriers free to serve who and where they wish;

(2) A key to service to small communities is the collective ratemaking process permitted by the Interstate Commerce Act. Very few small communities are so located as to obtain direct service from motor carriers. The service they receive is generally accomplished through a system of through-route, joint-line arrangements among the carriers. We are fearful that system would be destroyed if collective ratemaking were eliminated for the motor carrier industry.

(3) There is so much overcapacity and underutilization in the industry at the present time due to the excessive granting of operating authorities and the economic recession, that motor carriers are scrambling for freight in an attempt to fill up their empty vehicles;

(4) In the meantime, rates are being substantially increased on small shipments—both to small and large communities—such that this traffic will be able to be handled profitably in the future with or without the common carrier obligation. The issue becomes whether shippers and/or consignees in small and out of the way places will be able to afford the freight bill and remain competitive with their more fortuitously located counterparts. To the extent cross-subsidization existed prior to enactment of the 1980 law, it will be eliminated—a fact some see as a societal loss in terms of the feasibility of populations to continue to remain and prosper in smaller communities; and

(5) Lastly, basic economic logic suggests small communities will be disadvantaged relative to other locales in service and/or rates with solely free market forces at work. In general, a motor carrier's livelihood is predicated on volume handled and the "volume opportunities," if you will, are far greater in larger communities than small. With the high price of equipment and its relatively short life, motor carriers would be hard pressed to earn adequate returns on investment concentrating service where volume is light and sporatic, absent substantial rate increases.

Very truly yours,

Nelson J. Cooney,
General Counsel.

Senator **Danforth**. Donald Kuster. Mr. Kuster.

STATEMENT OF DONALD KUSTER, PRESIDENT, NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE, ACCOMPANIED BY KEN BOWERS, CHAIRMAN OF THE LEGISLATIVE COMMITTEE; AND JOHN DONLAN, LEAGUE COUNSEL

Mr. **Kuster.** Good morning. We have submitted a written statement to be entered in the record. I would briefly summarize it.

First, I would like to introduce Mr. Ken Bowers, on my left, who is chairman of our legislative committee and Mr. John F. Donlan on my right, who is league counsel.

The league believes that the Motor Carrier Act of 1980 is accomplishing the major objective outlined by the 96th Congress, and that it has resulted in the benefits to shippers, carriers, and the public. The increased competitive flexibility created by reform has allowed shippers and carriers to explore price-service options tailored to meet today's economic conditions. Without this flexibility the league believes that the current recession will have had a more severe impact on producers and the jobs they generate in meeting the demands of domestic and foreign commerce.

In supporting the congressionally forged compromise that is contained in the Motor Carrier Act, the league recognizes that this measure is only the first step in the transition toward ending unnecessary Federal regulation of this industry. The league would like to outline how our members believe the Motor Carrier Act should be further improved to insure that the competitive objectives of motor carrier regulatory reform are fully realized.

In the entry area, the league would urge the subcommittee to consider whether there is a need to continue the "public convenience and necessity" standard in the granting of operating rights authority, as well as whether there is a need to make further improvements insuring that all unnecessary entry regulations are eliminated. The league would support the Interstate Commerce Commission's recommendation that a "fit, willing and able" standard be substituted for the current "public convenience and necessity" test.

We also would urge the subcommittee to review the entry reforms contained in the 1980 law to assure that the procompetitive goals of the reform effort are continued.

With respect to pricing, the league believes that the experience of the trucking industry must be viewed in the context of general economic trends. Over the past 2 years, every sector of the Nation's economy, particularly cyclical industries, has suffered from the downturn in business activity. Just like the regulated truckers, league members are struggling with the difficult problems of finding markets for their goods in a less than optimal economy.

While a great deal of attention has been paid to the issue of price discounting, the league believes that this issue must be put in perspective with other developments occurring within the industry. To do so, two basic questions must be explored: In response to what competitive factors are these discounts being offered, and what is the list price from which discounts are being granted?

With respect to the first question, much of the cargo at issue is subject to diversion to rail piggyback service. The increased competition offered by the railroads, now that piggyback service is no longer subject to Federal regulation, has prompted motor carriers to engage in efforts to preserve this traffic base. According to the Association of American Railroads, while carloadings during the first 47 weeks of 1982 declined 12.8 percent from 1981 levels, piggyback carloadings increased 9.5 percent during this period.

Truckers' pricing decisions on the susceptible traffic are a response to new deregulated competition being offered by the railroads as well as the increased trucking competition resulting from the Motor Carrier Act of 1980.

To help motor carriers in their efforts to retain this traffic, the league would urge that the subcommittee consider reforms for the trucking industry to insure increased flexibility to meet competition.

With respect to our second question, the league would like to note that, between March and July of this year, the trucking industry filed 29 separate requests for general rate increases. The ICC approved all but three of these requests. In monitoring the general rate increase proposals sought this year by the trucking industry, the league would note that the Commission is analyzing them without resolving the controversy surrounding how to determine the revenue adequacy of the industry, and how to determine how to allocate the platform costs associated with the handling of LTL shipments.

The league has actively participated in the two major agency proceedings on these issues. We would urge that the general freight rate increase requests be used only for cost recovery purposes. We believe that the needs of industry and its consumers are better served if profits are pursued through individual pricing initiatives, rather than through across-the-board increases.

Mr. Chairman, we are out of time. We would be glad to answer any questions you may have.

Senator DANFORTH. Thank you very much, Mr. Kuster.

Does the league represent shippers throughout the country?

Mr. KUSTER. Yes; we represent approximately 1,800 shippers of all sizes and kinds of industries.

Senator DANFORTH. The question has been raised—Senator Packwood was asking about it—and the question has been raised as to whether or not the Motor Carrier Act has disadvantaged geographical areas in the country, small towns, rural areas, and so forth. Do you have any knowledge of that, or is the nature of your representation that there are people who are doing a lot of shipping and you probably would not notice it?

Mr. KUSTER. Well, I would speak for myself and my own company. We have not seen any negative effect in this regard. In fact, our experience to date has been a positive one. I would like to ask Mr. Bowers to respond.

Mr. BOWERS. Senator, my company has operations in relatively remote areas. We have a spare parts operation in the Mojave Desert of California; we have a small plant in Wellsville, N.Y., 60 miles southeast of Buffalo, as well as numerous other locations. We have had no indication of any diminution in service.

Mr. DONLAN. I might add, Mr. Chairman, we just finished the 75th annual meeting of the National Industrial Transportation League, which provided members with an ideal forum to discuss these types of problems or developments. As indicated, the members are small, medium, and large, and, furthermore, as an observer, I can tell you they are both sophisticated and articulate as well as independent. I listened carefully. It seemed to me that there was basic satisfaction with the Motor Carrier Act of 1980.

Senator DANFORTH. Is discounting a problem for some shippers? Do shippers view it as anticompetitive among themselves? That is, some shippers—one competitor is getting discounts; the other is not. Is that a matter of concern to you?

Mr. KUSTER. Again, my experience would say no, it has not been a matter of concern. As we said in our statement, one has to remember the list price from which discounts are granted. There have been many rate increases granted to the motor carriers in recent years.

In addition, there is nothing unsavory or unbusinesslike with discounting. Pick up any newspaper in a free-market system, there are discounts offered every day. People have the choice of shopping with or without the discount prices. It is what you pay in the end that you are really evaluating.

I would like to ask Ken Bowers if he would like to comment on that.

Mr. BOWERS. Again, I refer to the forum that John Donlan mentioned at the league's annual meeting in Detroit. We had no indication from the general membership—and it was an extremely large turnout because it was the 75th anniversary of the league—that there was any problem concerning those kinds of practices.

Mr. DONLAN. I might add one other thing, Mr. Chairman. There came across my desk yesterday a request by one of the rate bureaus, which recently obtained ICC authorization for a rather substantial general rate increase, and now are asking for authority to file a much reduced increase.

My own inference is that when the members of the bureau moved into the reality of the marketplace and the competition which characterizes the American economy, they concluded it was not a valid increase. We would be glad to supplement the record with more details, but certainly this is a world of competition and the league fully recognizes that was what was contemplated by the Motor Carrier Act.

Senator DANFORTH. Your industry has not experienced dislocations or has not been negatively affected by undue bankruptcies of truckers that you have been doing business with?

Mr. KUSTER. No; based on my own experience, there seem to be an abundance of carriers coming along to take their place. If there were a problem in this area, it might be more in the LTL carrier area than in the truckload carrier area. However, I have not experienced that in either type of operation.

[The statement follows:]

STATEMENT OF DONALD F. KUSTER, PRESIDENT, NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

Chairman Danforth, Members of the Subcommittee: My name is Donald F. Kuster. I am president of The National Industrial Transportation League. Accompanying me today are E. Kenneth Bowers, chairman of the League's Legislative Committee, and John F. Donelan, League counsel.

The National Industrial Transportation League is a voluntary association of 1,800 shippers, shippers' associations, boards of trade, chambers of commerce, and other entities concerned with rates, freight, and transportation services of all modes. It is the only nationwide organization representing all types of shippers using all modes of transportation to move all types of commodities. Our members, directly or indirectly, are responsible for the routing of 80 percent of our country's commercial freight.

The League's primary concern is to assure that our national transportation system is sound, efficient, well-managed, and privately owned and operated, and that it meets the needs of the nation as well as the needs of shippers and receivers of commercial freight. To arrive at the policies and positions reflecting our broad range of interests, League members, at least annually, consider, debate, and vote on pertinent transportation issues. Throughout our more than 75 year history, the League frequently has been the spokesman for business and industry on transportation matters.

The League is a strong supporter of reforming the federal regulations governing the trucking industry. We were active in seeking the passage of reform legislation, and in participating in the Interstate Commerce Commission's implementation of the Motor Carrier Act of 1980.

Based on our members' more than two years of experience under a more competitive regulatory environment, the League believes that the 1980 reform law is accomplishing the major objectives outlined by the 96th Congress, and that it has resulted in benefits to shippers, carriers, and the public.

The increased competitive flexibility created by reform has allowed shippers and carriers to explore price and service options tailored to meet today's economic conditions. Without this flexibility, the League believes that the current recession would have had a more severe impact on U.S. producers and the jobs they generate in meeting the demands of domestic and foreign commerce.

A recent poll of our Motor Rates and Practices—General Freight Committee indicates that shippers of a variety of sizes:

Are pleased by the flexibility resulting from increased entry and the diminished role or power of the rate bureaus, and by the increased competition.

Believe that reform was good for the industry, and, in the long run, will have a positive effect.

Believe that the economy, not deregulation, has been the primary cause of the high level of unemployment in the trucking industry.

In supporting the Congressionally forged compromise that is contained in the Motor Carrier Act, the League recognizes that this measure is only the first step in the transition toward ending unnecessary federal regulation of this industry. We agree with this Committee's assessment, made at the time the Motor Carrier Act was passed, that further changes to this law would be needed based upon experiences gained through allowing a greater play of market forces.

The League would like to outline how our members believe the Motor Carrier Act should be further improved to ensure that the competitive objectives of motor carrier regulatory reform are fully realized.

In the entry area, the League would urge the subcommittee to consider whether there is a need to continue the "public convenience and necessity" standard in the granting of operating rights authority as well as whether there is a need to make further improvements ensuring that all unnecessary entry regulations are eliminated.

The League would support the Interstate Commerce Commission's recommendation that a "fit, willing, and able" standard be substituted for the current "public convenience and necessity" test. We believe that the ICC's assessment of how the agency should allocate its limited resources has merit and deserves serious consideration.

We also would urge the subcommittee to review the entry reforms contained in the 1980 law to assure that the pro-competitive goals of the reform effort are continued throughout the phased elimination of all unnecessary federal regulation in the trucking industry.

With respect to pricing, the League believes that experiences of the trucking industry must be viewed in the context of general economic trends. Over the past two years, every sector of the nation's economy, particularly cyclical industries, has suffered from the downturn in business activity. Just like the regulated truckers, League members are struggling with the difficult problems of finding markets for their goods in a less than optimal economy.

One of the tools being used throughout the economy is the granting of incentives to reduce large inventories and inventory holding costs. Whether their products are automobiles, building materials, or home furnishing, U.S. producers are finding that the offering of price discounts is one of the tools necessary to keep afloat on today's troubled economic seas.

While a great deal of attention has been paid to the issue of "price discounting," the League believes that this issue must be put in perspective with other developments occurring within the industry. To do so, two basic questions must be explored: In response to what competitive factors are these discounts being offered? What is the list price from which discounts are being granted?

With respect to the first question, much of the cargo at issue is subject to diversion to rail piggyback service. The increased competition offered by the railroads, now that piggyback service is no longer subject to federal regulation, has prompted motor carriers to engage in efforts to preserve this traffic base. According to the Association of American Railroads, while carloadings during the first 47 weeks of 1982 declined 12.8 percent from 1981 levels, piggyback carloadings increased 9.5 percent during this period.

Truckers' pricing decisions on this susceptible traffic are a response to the new deregulated competition being offered by the railroads as well as the increased trucking competition resulting from the Motor Carrier Act of 1980.

To help motor carriers in their efforts to retain this traffic, the League would urge that the subcommittee consider reforms for the trucking industry to assure increased flexibility to meet competition.

With respect to our second question, the League would like to note that between March and July of this year, the trucking industry filed 29 separate requests for general rate increases. The ICC approved all but three of these requests. In one instance, the ICC suspended the proposal. In the other two cases, the rate bureaus withdrew them prior to their effective date. A list of these requests and the ICC's action on them are attached to this testimony.

Although the amounts sought in these rate hike requests varied according to weight and whether the movements were made in truckload or less-than-truckload lot sizes, the increases sought in each request generally ranged between 2 percent to about 10 percent. Gauging the impact of price discounts must be viewed in light of the increases in list prices resulting from these collective general increases.

As the economy improves, it can be expected that, like all other business endeavors, the level of prices to provide increased profits to the trucking industry will change.

In monitoring the general rate increase proposals sought this year by the trucking industry, the League would note that the Commission is analyzing them without resolving the controversies surrounding how to determine the revenue adequacy of the industry, and how to determine how to allocate the platform costs associated with the handling of LTL shipments.

The League has actively participated in the two major agency proceedings on these issues. We would urge that general freight rate increase requests be used only for cost recovery purposes. We believe that the needs of the industry and its consumers are better served if profits are pursued through individual pricing initiatives, rather than through across-the-board increases which ignore the marketplace conditions affecting each commodity.

We also would urge that the ICC be directed to resolve the issues, which prevent it from issuing clear guidelines on the two matters that are critical to determining and monitoring the health of this important segment of our national transportation system.

With respect to the collective ratemaking activity of the trucking industry, the League has submitted its views to the Motor Carrier Ratemaking Commission, and has discussed its views in testimony before this Committee.

In summary, the League believes that carriers should be subject to the antitrust laws, except wherein they are conducting their affairs in accordance with national transportation policy, and in accordance with the rules and regulations prescribed by the ICC. We further believe that as carriers obtain additional rate freedom to establish their prices and charges, there should be a counter-balancing reduction in the antitrust immunity provided in their ICC-approved rate bureau agreements. We look forward to working with the Study Commission and this Committee, when this issue is considered during the next Congress.

In conclusion, the League believes that the marketplace, not the federal government, continues to be the most effective regulator of competitive truck transportation services. Our experience under today's more competitive regulatory environment demonstrates that shippers and carriers can find effective private-sector solutions to their business problems.

We thank you for this opportunity to present the views of shippers. We look forward to working with this Committee to continue to enhance the competitiveness of this industry through the elimination of unnecesary federal regulation. We are now ready to answer any questions you may have.

Attachment to Oversight on Motor Carrier Act of 1980 testimony follows:

GENERAL INCREASES

Bureau and weight	Percent filed	ICC action	Percent effective	Date
C&SMFTA 63200-000: General increase.	1.25	Approved after refiled at 1 percent by Bureau.	1	Feb. 1, 1982.
MAC 6808:				
TL	7	Approved	TL 0.7	Feb. 8, 1982.
LTL	2.7		LTL 2.7	
MC	2.7		MC 2.7	
Access	2.7		Access 2.7	
PITB: General increase	2.5	Suspend I&S Dkt. M-30352.		Mar. 5, 1982.
ECMCA: TL	11.4	Approved	TL 11.4	Mar. 31, 1982.
Full roll-in: LTL	3.1		LTL 3.1	
Shortfall	(1)	(1)	(1)	
C&SMFTA:				
TL	2.5	Approved	TL 2.5	Apr. 1, 1982.
MC	$2.25		MC $2.25	
0-1,000	10		0-1,000 10	
Over 1,000	7.1		Over 1,000 7.1	
ECMCA SR-44589:				
TL	4.5	Approved	TL 4.5	Do.
LTL	6.5		LTL 6.5	
MC	6.5		MC 6.5	
Access	6.5		Access 6.5	
SMCRC 10506-030 et al.:				
TL	1.5	Approved	TL 1.5	Do.
LTL	7.4		LTL 7.4	
MC	$1.90		MC $1.90	
Access	7.4		Access 7.4	
CSMFB R-1479:				
TL	4.5	Approved	TL 4.5	Do.
LTL	8.3		LTL 8.3	
MC	8.3		MC 8.3	
Access	8.3		Access 8.3	
CSMFB: TL	11.6	Approved	TL 11.6	Do.
Full roll-in: LTL	3.1		LTL 3.1	
Shortfall	None			
MAC 7070:				
TL	5.5	Approved	TL 5.5	Do.
LTL	7		LTL 7	
MC	7		MC 7	
Access	7		Access 7	
MWMFB:				
TL	5	Approved	TL 5	Do.
LTL	7		LTL 7	
MC	7		MC 7	
Access	7		Access 7	
NEMFB 4:				
TL	4.5	Approved	TL 4.5	Do.
LTL	6.5		LTL 6.5	
MC	6.5		MC 6.5	
Access	6.5		Access 6.5	
RMMTB:				
TL	6.2	Approved	TL 6.2	Do.
LTL	6.2		LTL 6.2	
MC	6.2		MC 6.2	
Access	6.2		Access 6.2	
MAC fuel: TL	10	Approved	TL 10	Do.

GENERAL INCREASES—Continued

Bureau and weight	Percent filed	ICC action	Percent effective	Date
Roll-in: LTL	3.1		LTL 3.1	
Shortfall	[1]	[1]	[1]	
RMB fuel: TL	10.65		TL 10.65	Do.
Roll-in: LTL	3.1		LTL 3.1	
Shortfall	[1]	[1]	[1]	
PITB fuel: TL	6.8	Approved	TL 6.8	Apr. 4, 1982.
Roll-in: LTL	2.6		LTL 2.6	
Shortfall	None			
PITB 2880:				
TL	4.5	Approved	TL 4.5	Apr. 5, 1982.
LTL	4.5		LTL 4.5	
MC	4.5		MC 4.5	
C&SMFTA fuel related	.0			
shortfall: LTL.	2	Approved	LTL 2.0	Apr. 12, 1982.
NEMRB:				
TL	8.7	Approved	TL 8.7	Do.
LTL	3.1		LTL 3.1	
Shortfall	None			
C&SMFTA: TL	11.9	Approved	TL 11.9	Apr. 13, 1982.
Fuel roll-in: LTL	3.1		LTL 3.1	
MWMFB: TL	11.3	Approved	TL 11.3	Do.
Fuel roll-in: LTL	3.1		LTL 3.1	
MWMFB fuel related shortfall:				
TL 1.44	Approved		TL 1.44	Do.
LTL	1.44		LTL 1.44	
SMCRC fuel roll-in:				
TL	12.5	Approved	TL 12.5	Do.
LTL	3.1		LTL 3.1	
SMCRC shortall:				
TL	4.9	Approved	TL 4.9	Do.
LTL	2.4		LTL 2.4	
C&SMFTA: TL	5.5	Approved	TL 5.5	July 12, 1982.
RMMTB: General increase	5	do	5	July 19, 1982.
ECMCA SR-44820: [2]				
LTL	4	[3]	[3]	[3].
AQ	4			
CSMFB:				
TL	2	[4]	[4]	July 30, 1982.[5]
LTL over 5,000	2			
0-4,000	6			
MWMFB:				
0-499	10	Approved	0-499 10	July 31, 1982.
500-4,999	6		500-4,999 6	
5,000-10,000	2		5,000-10,000 2	

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[1] Recovered in Apr. 1, labor related increase filing.
[2] Central territory only.
[3] Originally scheduled to become effective July 27, 1982—postponed by Bureau to Aug. 31, 1982 then canceled.
[4] None. Bureau postponed to Aug. 30, 1982 then canceled.
[5] Date originally scheduled for.

Senator DANFORTH. Thank you all very much.

Next we have a panel—Bill Scheffer, Richard Henderson, and Robert Gallagher.

Mr. Scheffer, would you like to start? Mr. Scheffer is not here. OK. Is anyone here representing the independent truckers?

[No response.]

Senator DANFORTH. All right. Mr. Henderson.

STATEMENT OF RICHARD D. HENDERSON, EXECUTIVE VICE PRESIDENT, PRIVATE TRUCK COUNCIL OF AMERICA, INC., ACCOMPANIED BY JOHN A. DeVIERNO, GENERAL COUNSEL

Mr. **Henderson**. I am Richard Henderson. I am executive vice president of the Private Truck Council of America. We are the only national independent organization representing private truck fleets.

Senator **Danforth**. Could you speak a little more directly into the mike? Thank you.

Mr. **Henderson**. In today's oversight hearing we would like to address three developments relating to the Motor Carrier Act.

The first and most important issue we would like to direct to this committee's attention concerns compensated intercorporate hauling done on an interstate basis. A pattern is developing in some of the States in which compensated intercorporate hauling engaged in by private carriers on an interstate basis is not recognized as exempt private carriage, but as for-hire carriage for which registration and fee payments are required.

The State of Georgia, for example, considers interstate compensated intercorporate hauling to be exempt for-hire transportation and requires private carriers engaged in this activity to secure a registration permit from the Georgia Public Service Commission upon payment of a $25 filing fee. Additional annual registrations are required along with renewal fees.

We submit that these Georgia registration requirements contravene implicit requirements of Federal law, particularly the general purposes of the CIH—and I will refer to compensated intercorporate hauling as such from now on—provision, section 9, of the Motor Carrier Act.

Section 9 and its legislative history reflect two principal and related purposes: First, a desire to minimize the paperwork and other regulatory burdens on CIH carriers, burdens which Congress perceived to have impeded CIH operations in the past; and, second, a desire to eliminate any delay in the implementation of CIH operations by allowing carriers to conduct CIH operations the instant they file the required notice with the ICC.

Georgia's requirement frustrates and conflicts with both of these purposes. Numerous statements in the legislative history reflect the desire of the Congress to minimize regulatory burdens in this area. In particular, this committee's report on the legislation made clear that the notice requirement applicable to CIH carriers was intended to be a one-time minimal requirement. Given the clear congressional intent that the CIH notice requirement be extremely simple and nonburdensome, we cannot believe that Congress intended to allow States to burden CIH carriers with potentially as many as 50 additional filing requirements.

Thus, we believe a strong argument can be made that Georgia's requirement for the registration of fleets engaging in CIH is in conflict with section 9 of the Motor Carrier Act. However, and unfortunately, the Georgia authorities have been unsympathetic to our concerns and appear to intend to continue to impose these requirements.

This State action needlessly burdens interstate commerce, Mr. Chairman. Not only are such requirements objectionable because they are potentially numerous, and require fees to be paid on an annual basis, they require CIH operators to spend time and salaries on completion of forms and other aspects of administrative compliance and all the paperwork requirements.

Further, in Georgia's case, the State requires receipt of a permit by the carrier before it can begin operations within the State. By contrast, under the Motor Carrier Act a carrier may commence his CIH operations as soon as it puts its notice to the ICC in the mail. Thus, in the Georgia case, an additional burden results from the fact that the State is delaying the implementation of CIH until the State responds back to the carrier.

Finally, because the Motor Carrier Act specifically requires that a copy of the CIH carrier's notice to the ICC be kept in the cab of each vehicle conducting these operations, Georgia's authorities can readily ascertain from the driver whether a CIH operation is indeed valid. The requirement of any further registration with the State does not result in the State really having any more additional information.

Thus, Mr. Chairman, we ask the Congress to enact appropriate legislation which will end the possibility of States imposing such unwarranted burdens on CIH operations. One approach to such legislation would be to add a new subsection to title 49 of the United States Code, section 11506, to explicitly preempt any State from requiring registration with respect to CIH operations. We believe such an amendment would be in the public interest and would be consistent with this committee's longstanding concern for reducing regulatory burdens.

Two other points, very briefly. One, we are participants in the court proceedings to uphold the ICC's decision in Ex Parte No. MC-122, the single source leasing case. We supported the ICC's decision on that and we are hopeful of a favorable court action.

Finally, just a comment on the section 19 study relating to the burden on interstate trucking operations which results from a myriad of State regulations. We understand this report has been issued, although I am not entirely sure that it has. If it has not, I hope the committee will see to it that it is delivered to the Congress and, most importantly, that action be taken to implement the recommendations of that study.

Thank you, Mr. Chairman.

[The statement follows:]

Statement of Richard D. Henderson, Executive Vice President, Private Truck Council of America, Inc.

My name is Richard D. Henderson and I am Executive Vice President of the Private Truck Council of America, Inc. We are the only national independent organization representing private truck fleets.

In today's oversight hearing, we would like to address three developments related to the Motor Carrier Act of 1980.

STATE INTERFERENCE WITH INTERSTATE CIH

The first and most important issue we would like to direct to the Committee's attention today concerns interstate compensated intercorporate hauling (CIH). A pattern is developing in some of the States in which compensated intercorporate hauling engaged in by private carriers on an interstate basis is not recognized as exempt private carriage, but as for-hire carriage for which registration and fee payments are required.

The State of Georgia, for example, considers interstate compensated intercorporate hauling to be exempt for-hire transportation and, as such, requires private carriers engaged in CIH to secure a registration permit from the Georgia Public Service Commission upon payment of a $25.00 filing fee. Additional annual registrations are required along with renewal fees.

We submit that these Georgia registration requirements contravene implicit requirements of federal law—particularly the general purposes of the CIH exemption enacted in Section 9 of the Motor Carrier Act.

Section 9 and its legislative history reflect two principal and related purposes: first, a desire to minimize the paperwork and other regulatory burdens on CIH carriers, burdens which Congress perceived to have impeded CIH operations in the past; and second, a desire to eliminate any delay in the implementation of CIH operations by allowing carriers to conduct CIH operations the instant they file the required notice with the ICC. Georgia's requirement for CIH registration frustrates and conflicts with both of these purposes.

Numerous statements in the legislative history reflect the desire of the Congress to minimize regulatory burdens on CIH. In particular, this Committee's report on the legislation made clear that the notice requirement applicable to CIH carriers was intended to be a "*one-time* minimal requirement" (emphasis supplied). Given the clear congressional intent that the CIH notice requirement be extremely simple and non-burdensome, we cannot believe that Congress intended to allow states to burden CIH carriers with potentially as many as 50 additional filing requirements.

Thus, we believe a strong argument can be made that Georgia's requirement for the registration of fleets engaging in compensated intercorporate hauling is in conflict with the congressional intent of Section 9 of the Motor Carrier Act. However, the Georgia authorities have been unsympathetic to our concerns and intend to continue to impose these requirements.

This State action needlessly burdens interstate commerce, Mr. Chairman. Not only are such registration requirements objectionable because they are potentially numerous, and require fees to be paid on an annual basis, they require CIH operators to spend time and salaries on completion of forms and other aspects of administrative compliance.

Further, in Georgia's case, the State requires *receipt* of a permit by the carrier before it can operate within the State. By contrast, under the Motor Carrier Act, a carrier may commence CIH operations as soon as it puts its notice to the ICC in the mail. Thus, in the Georgia case, an additional burden results from the fact that the State delays the implementation of CIH until the State sends the permit back to the carrier.

Finally, because the Motor Carrier Act specifically requires that a copy of the CIH carrier's notice to the ICC be kept in the cab of each vehicle conducting CIH operations, Georgia's authorities can readily ascertain from the driver whether a CIH operation is valid. The requirement of a further registration with the State does not result in the State having *any* additional information.

Thus, Mr. Chairman, we ask the Congress to enact appropriate legislation which will end the possibility of States imposing such unwarranted burdens on CIH operations. One approach to such legislation would be to add a new subsection to 49 U.S.C. § 11506, to explicitly preempt any State from requiring registration with respect to interstate CIH operations. We believe such an amendment would be in the public interest and would be consistent with this Committee's longstanding concern for reducing unnecessary regulatory burdens.

SUPPORT FOR ICC DECISION ON SINGLE SOURCE LEASING

The Private Truck Council of America supports and is a participant in court proceedings to uphold the ICC's decision in Ex Parte No. MC-122 (Sub.-No. 2), regarding private carrier single source leasing. In its decision, the ICC relied upon the Motor Carrier Act of 1980 to support its findings. We agree with the ICC's decision in this proceeding and believe it will result in more efficient utilization of trucks and improve national productivity.

OTHER STATE REGULATIONS

Section 19 of the Motor Carrier Act of 1980 required the DOT and the ICC to report to the Congress as to how the burden on interstate trucking operations which results from conflicting state regulations can be alleviated. While I have already highlighted our primary concern in this area, State interference with interstate CIH, we wish to reiteate today our general support for the elimination of conflicts between State regulatory schemes and our support for a general reduction in State regulations. While we have not yet reviewed the final Section 19 report, which we understand has finally been issued (one year late), we are confident that the report will provide sufficient factual basis for prompt legislative action by the Congress to eliminate unnecessary burdens on interstate truck operators. We look forward to working with the Committee in efforts to respond to the problems identified in the report.

This concludes my prepared statement, Mr. Chairman. The PTCA appreciates the opportunity to testify, and I would be pleased to respond to any questions you may have.

Senator DANFORTH. Thank you, sir. Mr. Gallagher.

STATEMENT OF ROBERT J. GALLAGHER, COUNSEL FOR TRANSPORTATION BROKERS CONFERENCE OF AMERICA

Mr. GALLAGHER. Mr. Chairman, I am general counsel of the Transportation Brokers Conference of America.

We wanted to bring before the oversight committee some of our comments and some of our experiences since the passage of the Motor Carrier Act. The transportation broker is a fairly new entity in the transportation business. I have prepared a statement which I have served and which I would ask be incorporated, and I understand it will.

To summarize that statement briefly, I would note, Mr. Chairman, that the transportation broker came in after the passage of the act, when many of these new and innovative measures had been passed. I think that we should put before this committee how the transportation broker has ameliorated some of the problems that I believe were created by the passage of the act.

During the past two sessions of this committee, the chairman has heard much testimony about volume discounts and contract carrier systems, and has heard comments about the potentiality of predatory pricing. Let me point out to the chairman and to this committee that the transportation broker has had a most beneficial impact in these areas.

When the act was first being passed, it was never contemplated that if you moved your household goods—for a widow moving from Chicago to Florida—that the movement of those household goods might be as much as 25 percent higher in cost than the movement of the household goods of an employee of IBM. This certainly had not been contemplated at the time of the act. It had not been contemplated at the time of the act that volume discounts would be given in such profusion to large shippers. It had not been contemplated at the time of the act that contract carriers would emerge as such a vital segment of the transportation industry.

Unfortunately, each of those things could have created a problem for the consumer and could have negated many of the advantages of the act. The transportation broker, however, has now come in as an ameliorating influence on these particular instances.

The transportation broker has secured the ability to have carriers who will be contract carriers for it and, therefore, these small shippers who cannot get volume discounts can now utilize the service of the transportation broker and secure the benefit of the volume discount. The transportation broker, by having contract carriers, can extend these privileges to a wide group of shippers.

But, Mr. Chairman, during the past weeks and months that I have been listening to much of the discussions about the passage of the Motor Carrier Act, I have heard, it seems, almost unfair optimism among those who have supported it, that nothing went wrong and that everything came out perfectly. And we certainly have heard a certain amount of pessimism here on the part of the American Trucking Associations and other groups such as that.

I think it is fair to say that there have been good things, but there have been bad things that have come from the passage of the act.

The transportation brokers believe that they have contributed in a significant measure to aiding the better potential of the act. We, therefore, are coming before your committee, and before the Congress, and seeking to impress upon you the role that the transportation broker has played in this process.

We are also coming before the committee and suggesting to the committee that much of this activity is being played out against an economy in which there is an overcapacity of carriers and an undersupply of traffic. We believe that at this particular time the Congress should not move forward because operating on the factual situation that is now being presented would be misleading. Further deregulation should be very carefully studied, because we are concerned about what happens when the carrying capacity of the carriers start to reach or reaches the traffic capacity of the shipping public.

Under many of the contracts that we have been given by major carriers, there are very strong provisions as to supplying service to these favored, large national shippers. These factors should be considered after the economy returns to its normal course to see if they will not prejudice the small, unfavored shippers.

The broker is the friend of the small shipper and we are here testifying for him. But the broker is also the friend of the small carrier. We provide sales services for many of those carriers, and we wish to point out that in the present unsettled state of transportation that further regulatory measures should be very carefully considered before being enacted.

To sum up, I would say let the dust settle for awhile and let's see what will result when traffic has returned to the roads of this country.

[The statement follows:]

Statement of Robert J. Gallagher, Counsel, Transportation Brokers Conference of America, Inc.

My name is Robert J. Gallagher. I am Counsel to the Transportation Brokers Conference of America, Inc. (TBCA). I am a Partner in the law firm of Pearce & Gallagher, 1000 Connecticut Avenue, NW, Suite 1200, Washington, DC.

I fully realize that the hearing today is a prelude to a more exhaustive examination scheduled early in 1983, as to: (1) effects of the Motor Carrier Act of 1980, related statutes and regulatory implementation, and (2) legislation likely to be proposed to, as it were, "sunset the ICC."

We thought it of paramount importance to appear before you today.

There are several reasons:

(1) First, we hold that the Motor Carrier Act as recently promulgated, and implementing Decisions have created a new transportation business entity, the property

broker, so expanded by role that he is different in kind from any definition of function of transportation brokerage in the past;

(2) Second, we believe expansion of the broker's role is justified in the public interest;

(3) Third, we are convinced that within ten years, the broker will direct more than half of all intercity traffic in the United States, and that he is the best guarantee to the public interest in seeing that door-to-door, low cost, intermodal systems perform efficient and cost effective service between any two points in the free world;

For a more lengthy account of our perspective, I offer to each member of the Committee, and Mr. Chairman, a reprint of the first definitive published description of a broker under the new deregulatory law and regulations, as carried November 1, 1982, in Traffic World.

With reference to the Commission, there are some of us who have been working for several years to assure whatever the deregulatory atmospheric conditions might bring, the public interest would be served, and we think better served, despite any changes in the role of the Commission. Those of us engaged in this endeavor are very pleased indeed with the recent unanimous Decision of the six member Commission—the only Decision I know of so rendered on the subject of brokers.

In the ICC Decision of September 17, 1983, Docket No. MC-152509 Sub-No. 5, which became effective only on September 18, 1982, is the final step of a series, and is the full Magna Carta for this new type of shipper-carrier intermodal entrepreneur.

Mr. Chairman, I am prepared to extend, expand upon or otherwise support as an interpretation of law, the assertion that under the Act, and implementing Decisions now rendered, the broker is able to act as:

(1) a shipper;

(2) the carrier, and or one who may control and/or own one or more carriers;

(3) a domestic and/or foreign (custom) forwarder-broker;

(4) member of a shipper association;

(5) co-broker, here and abroad;

(6) one empowered to support carrier applications for certification;

(7) a company or industry that can put together any combination of carrier or shipper arrangements that facilitate more efficient movement of cargo between any two points domestically or overseas.

Under the new law and Decision:

(1) the broker is the shipper, if he consolidates shipments under concept of contract carriage; if he facilitates successful performances in his chosen role as a broker; to act as a shipper, he serves the cargo owners convenience or a distribution plan; if he performs anything beyond solicitation of freight; and, if he selects carriers in facilitating his role;

(2) he can acquire one or more carriers, and offer carrier capability, especially as he seeks to perfect cartage and long haul in new and improved total door-to-door systems regionally and transcontinentally;

(3) he can co-broker with others of his own industry in putting together any combination of carrier/shipper arrangements which facilitate more efficient movement of cargo between any two points domestically or overseas;

(4) he is most fortuitously upheld in the right to "hold" contract carriers;

(5) he is entitled to join shipper associations as a shipper;

(6) he is fully empowered to support carrier applications for certifications.

The broker is the only one that under new deregulatory prescriptions can best serve the public interest, offering quality of treatment and service to small and large shipments and communities and like. The broker role will afford the public a distribution enterprise that can handle all levels of cargo properly, by all levels of transport, with proper allocations for efficiency and cost of service.

It's a whole new ball game.

The broker is the one transportation element beautifully equipped to buttress against the change in a tide sweeping transportation.

The dam has broken. Brokers of Household Goods can ship General Commodities. Brokers of General Commodities can ship Household Goods. Coast to coast vans can backhaul broker-consolidated loads, cutting unit operating costs and offering lower rates to the shipping public.

There is no proscription against the broker filing a motor carrier application, in the case of Shipper Freight Services, a small company in Wilsonville, Oregon, an affiliated truck company applied. On a triple Appeal, on Emergency basis, Temporary Authority was granted.

INDUSTRY SIZE

Mr. Chariman, if all I say is true, what is the response?

In less than 12 months, we estimate that some 1,000 have entered the field. We believe that the number will swell to 12,000 in three years. The need for fiscal and full carrier responsibility is mounting, and we intend to offer for your consideration, proposed legislation and guidelines that will assure operating standards of highest excellence.

In fact, the Transportation Brokers Conference of America, Inc. was formed for just such reasons, the best known largest, and most responsible companies got together two years ago to see what could, and should be done to protect the public interest. Properly identified responsible entrants, hold out a high standard of excellence. At our meeting next March in Atlanta, we shall have ready for presentation to the membership: training manuals, courses of study, and examinations as to know-how and financial stability.

At founding meeting a year ago, the Conference had fifty members. At our recent convention in Seattle on October 15, 1982, the membership stood at more than 100. Applications have been streaming in the rate of about 20 a month currently.

To those who view this sudden growth with alarm, let me emphasize that big numbers always accompany a new industry reflecting new law and service to the American people. There were more than 1,000 railroads at the turn of the century. There were more than 15,000 regulated truck companies at the height of that industry's expansion. Growth and responsibilities tend to weed out, merge and otherwise distinguish the men from the boys in each of the service industries.

We believe the law and regulations are working in the public interest, and that the advents of the large broker does well for better service, lower rates, better equipment utilitzation.

Likewise, to those among the established carrier industry, we say that the large, consolidated broker, offering shippers the whole range of multi-carrier intermodal services at competitive rates is a boon to carriers as well as shippers. Trans continental systems are encouraged by rail, and by truck, each finding its own optimum distance haul and rates; truck companies get a chance to keep the pipeline full, cutting out idled time and equipment and excessive warehousing.

Many broker companies have been around as long as the motor carrier industry itself. Many of them had departments for some of the worlds largest shippers. Some of them have helped many of the better known carriers. Today, with piggyback and other rates no longer regulated, with no central information industry to tell a shipper where it can ship and by whom, and at what price, the broker of long standing is his only trusted source. And now, that broker can offer him the same reliability and underlying carrier services.

For many years, transportation policy experts have talked about: the department store of transport services; or a need for "integration of services by mode" each to his efficient specialty, etc.; or a need for a shipper-oriented forwarder-type carrier or agent—one cared first for the shipper, and one who depicts the optimum route, the best equipment, the quality service at the lowest rate.

Well, thanks to the new law and implementing decisions, that day has come. In my judgment, it could have come with changes in regulation, but that is demonstrably past, so that the broker must come to the fore to assure growth performance and information to the American public.

It is true that the inefficient, financially irresponsible carrier, whether agent or whether new fly-by-night, will increasingly have a tough time of it. But, vigorous responsive carrier management will find an environment to thrive in.

Quite as important, the small shipper and the small town will be back on the mainstream of America.

Mr. Chairman, our members stand ready to support any effort to make solid and secure the new public service to the Motor Carrier Act of 1980, in implementing Decision have set out. I and my associates would like to work with you, your colleagues, and your staff, in furthering this effort.

We are rather intimately aware of various sorts of proposals looking for the twilight of the nation's oldest regulatory body. Some of us in the past have thought that such efforts might have better taken an alternate course, but the changes already undertaken guarantee that the broker can expand to offer full services whether the ICC goes out of existence or not.

Thank you for allowing us to appear before you today.

Senator DANFORTH. In other words, on the discount question your view is that we should do nothing now—just let the discounts continue to take place and make a judgment on it after we hear from the ICC and after we get a better view of what the economy is going to do?

Mr. **Gallagher**. I would hope that the committee would encourage the ICC to get a decision out on discount prices because I think that it is almost unconscionable that after 2 years in which one of the major issues that is before the Commission as to whether discount pricing is predatory and what its effect is, that the industry has a right to have a decision.

When that comes out, I think that then we could come back to this committee.

Senator **Danforth**. OK.

Mr. Henderson, with respect to your problem in Georgia, do you have some sort of litigation going on that, or is there an administrative proceeding or a case in court on that question?

Mr. **Henderson**. No; not at the present time, Mr. Chairman. I would like to have counsel comment I did not identify him; this is John DeVierno, our general counsel.

Mr. **DeVierno**. Mr. Chairman, I think that, you ask a good question—whether litigation is possible—but I think that what we want to point out today, and perhaps the order of the statement does not reflect it, is that in addition to the legal questions that have to be addressed before any case would be brought, we would have to consider several things.

One is that a national organization filing a suit in one State still might have to convince other States by numerous other suits, and one question is whether we can achieve our goals in one case. Legislation would be a nationwide solution.

The other point, which we really wanted to emphasize today, are the policy factors. Particularly since under the CIH rules the notice of the ICC's involvement in the carriage is carried in the cab, and given the special congressional sanction for CIH, we do not see the need for further State registration. The State has all the information it needs.

Senator **Danforth**. I understand your position. I frankly have not focused on it at all one way or another. It is a matter of very specific concern. But your view, as I understand it—and I do not comment on this one way or the other; I want to make that clear—but your view is that it is contrary to the intent of Congress and also that it is a burden on commerce.

It seems to me that those are matters that are ripe for litigation, if that is your view. I do not know of anything that is coming through Congress which would clarify it one way or another.

Gentlemen, thank you very much.

[Whereupon, at 12:03 p.m., the committee adjourned.]

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

STATEMENT OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Almost three years ago, this Committee recognized that the Interstate Commerce Commission was causing broadscale disruption and uncertainty in the trucking industry by improvising wholesale changes in the regulatory environment. After months of hearings Congress determined that there was a need for an update in the regulatory framework. You also recognized the compelling necessity for explicit direction to guide the ICC in carrying out its assigned responsibilities. The Motor Carrier Act of 1980 spells out the full measure of change and the implementing instructions approved by Congress. The Act directs the ICC to minimize disruption in the industry and specifically admonishes the Commission not to attempt to go beyond its statutory authority.

Our expectations of responsible implementation of the law were not long lived. The Commission's leadership has paid no more than lip service to carrying out the Act as it is written.

Heedless of entry standards adopted by Congress, the Commission adopted policies requiring carriers to seek authority beyond their means and interest and has rubber stamped thousands of applications regardless of demonstrable need. Time and again, our Union has been to the courts in an attempt to bring the Commission back to the reality of its obligation to abide by the Act. Time and again, the appellate courts have agreed that the Commission has exceeded its authority and have directed that it must bring its policies and actions into accord with its statutory mandate. Nevertheless, the Commission continues to press its own version of deregulation.

We have appeared before the Congress to document the unprecedented layoffs and job losses that have impacted on our members who have served the public for many years as employees in the freight industry. Our most recent survey indicates that more than 28% of our members working in general freight are on layoff. This is almost three times the level of unemployment reported in the general economy. In many areas of the nation, the situation is much worse.

Congress made it clear that the 1980 Act in no way was to be construed as altering the common carrier service obligation. Yet the Commission has insisted on granting carriers authority they do not request and which they cannot hope to serve. Nevertheless, the public is entitled to expect certificated carriers to provide responsive service to the full extent of their operating authorities.

In an effort to assure itself of responsive service, the Department of Defense recently resorted to its own self-help enforcement program. During the ten month period August 1981 to May 1982, the Department imposed 98 disqualifications and 13 probations on regulated freight carriers. Unfortunately, very few shippers have the economic clout of the Department of Defense.

Since July of 1980, the trucking industry has experienced widespread rate slashing which has been spurred by desperate attempts to survive in the midst of overcapacity, serious recession and aggressive efforts to increase market share regardless of cost. Although responsible managers have directly attributed to below cost rate wars to the demise of their companies, the Commission has thus far declined to intervene.

The devastating results of irresponsible rate cutting are readily observable in their impact on owner-operators. The Department of Agriculture reports that owner-operators costs have risen 15% during the period November 1980 through November 1982. Yet 75% to 85% of the burden of rate cuts comes directly out of the pocket of owner-operators. As a result, the USDA reports that almost 40% of owner-operators are on the highway 15 hours or more per day. In addition, a recent truck stop survey found that owner-operators are substantially increasing driving time between rest and meal stops in an effort to stave off financial ruin.

Several months ago, our Union filed a petition urging the Commission to determine owner-operator costs and to assure that carrier rates would at least cover those costs. Despite the fact that such action would relieve the unconscionable burden on owner-operators, the Commission has yet to act on our petition.

Just recently, the Commission has agreed to take a look at the impact of pricing practices on the motor carrier industry. Thus far, it has requested only written statements and has not committed to hearings on the scene where the real impact of rate slashing activity is more evident. We urge the Committee to join in insisting that each of the Commissioners commit to preside at one or more hearings in key cities across the nation to develop an adequate record that will fully disclose what has happened to the trucking industry over the past 2½ years. We believe that such a record will be invaluable to Congress and to all of the parties that are genuinely interested in the longterm health and survival of our transportation system.

Our Union has not come here to find fault with the new laws. The truth is that the 1980 Act never has been tested because it never has been responsibly implemented by the Commission. We believe it is about time the Commission be directed to do just that.

The Commission's leadership should be expected to carry out its assigned responsibilities. To that end, we urge that the ten actions set forth below are required to bring implementation of the act into full conformance with your intent. The first eight concern the Commission; the ninth action must be taken by the Secretary of Transportation, and we urge that the tenth action be taken by Congress.

1. Before issuing a certificate authorizing motor carrier service, the Commission should be certain that the applicant is physically and financially able to provide service coextensive with the certificate of authority and has not violated the Commission's rules or DOT's safety and insurance regulations. The Commission should also require evidence that the proposed service will serve a useful public service responsive to a public demand or need. In all of its actions, the Commission should comply with the National Transportation Policy (Section 10101), including its requirements to encourage fair wages and working conditions; to enable carriers to earn adequate profits, attract capital and maintain fair wages and working conditions.

2. The Commission should adopt a policy that carriers shall be required to provide service on demand, coextensive with their certificate. As a corollary, the Commission should not issue a certificate to a carrier which exceeds the scope of that applied for or which exceeds the applicant's ability to serve within 90 days after issuance of the certificate.

3. The Commission should commence and continue to monitor the operations of carriers to make certain they are fulfilling their common carrier obligation and are providing service to small shippers and small communities in their service area. Enforcement proceedings are needed as sanctions.

4. The Commission should adopt a policy statement requiring that rates published by carriers (a) must be at or above fully distributed costs; and (b) shall not discriminate against any shipper within the scope of the carrier's certificate by affording shippers in one area lower rates than those available to shippers in another area.

5. Every decision of the Commission implementing the Motor Carrier Act of 1980 explicitly shall consider and comply with the admonition in Section 3(a) that the Act is to be implemented with the least amount of disruption to the transportation system.

6. The Commission should promptly ascertain and maintain on a current basis the total costs of owner-operators whose services are used by regulated carriers in providing service to shippers. These costs are required by Section 10701 to be included by the Commission in determining adequate revenue levels and by the National Transportation Policy (Section 10101). The Department of Agriculture publishes such costs on a monthly basis for owner-operators engaged in hauling agricultural commodities.

7. The Commission should implement Section 10527 by requiring written contracts for the movement of exempt commodities. The Commission has declined to require such contracts even though it has recognized in its fuel reimbursement program that owner-operators "are in a weak financial position and lack the bargaining power to improve this position." It was Congressional recognition of owner-operators' "weak bargaining position" that led to the enactment of Section 10527.

8. The ICC and the Supreme Court held for more than 20 years that single source leasing of an owner-operator and his equipment constituted for-hire transportation requiring ICC authorization. By a policy statement in February of this year, the Commission overturned these decisions, stating that single source leasing is now private carriage. It assigned the Motor Carrier Act of 1980 as the reason for this radical departure from historic practice, despite the fact that the 1980 Act did not change the definition of private and for-hire carriage. The Act thus provides no au-

thority for single source leasing. The Commission action transforming for-hire carriage to private carriage is contrary to the Congressional Findings (Section 3(a) of the 1980 Act), which direct the ICC not to exceed the power vested in it by the Interstate Commerce Act and to implement the Act with the least amount of disruption to the industry. At a minimum, consistent with its findings regarding the lack of bargaining power of owner-operators, the Commission should have required that single source leasing contracts should be in writing so that shippers' ability to exploit the "weak financial position" of owner-operators would be thereby reduced.

9. The Secretary of Transportation should increase the amount of insurance required for any vehicle to $750,000 and coordinate with the ICC to see that there is strict compliance with this requirement prior to the issuance of a certificate or permit. The Department of Agriculture reported recently that owner-operators are driving on an average between 15 and 16 hours per day. The Secretary is thus not adequately enforcing his regulation limiting driving to 10 hours without rest. Excessive driving hours and accompanying fatigue are recognized as a primary cause of highway accidents. Adequate insurance coverage and effective enforcement of existing safety regulations, including checking of logs which drivers must maintain, are minimum protections the Secretary can afford the driving public.

10. The Teamsters Union requested inclusion in the 1980 Act of an employee protection program. The program was rejected with the assurance that the Act would be so implemented that no dislocation of employees would result. The Chairman of the House Committee pointed out that oversight hearings are required each year. He added: "If there is a lot of trouble, this Subcommittee will respond as it has in the past." Our studies show that approximately 28 percent of our members engaged in general freight are on layoff. In the light of these layoffs, Congress should accord displaced employees income protection and priority reemployment status.

Layoffs and bankruptcies continue to mount at an alarming rate. The American Trucking Association reports that the entire trucking industry reported a deficit for the first half of this year and industry income was down 78 percent in the third quarter. The situation is extremely serious and threatens to get much worse if the Interstate Commerce Commission is allowed to continue its own brand of deregulation. Your immediate intervention and firm redirection is sorely needed to avert a very real disaster.

STATEMENT OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

The National Association of Manufacturers (NAM) appreciates this opportunity to submit its views for the record on implementation of the Motor Carrier Act. The NAM is a voluntary business organization of approximately 12,000 members and has affiliations through its Associations Department and the National Industrial Council with an additional 158,000 businesses. NAM members account in the aggregate for nearly 80 percent of the nation's industrial output and 85 percent of the nation's industrial workforce. As the nation's major manufacturing business trade association, NAM is vitally concerned with promoting competition within the motor carrier industry.

Passage of the Motor Carrier Act of 1980 was generated by the widespread belief in Congress that the statutes governing federal regulation of the motor carrier industry had become outdated and that the existing regulatory structure inhibited motor carrier growth and utilization. In the second year of implementation, there is considerable evidence that the significant reforms of the Act—eased entry, rate flexibility, and reduced antitrust immunity—have promoted competition in the trucking industry. The Interstate Commerce Commission has granted almost 50,000 new certificates for operating authority since the effective date of the Act, and new applications are being filed at the rate of nearly 1,000 each month. In the area of pricing, an influx of independent ratemaking actions has resulted in a general reduction of rates. Nevertheless, the NAM believes that the overall rate level for motor carrier service is higher today than it would be without collective ratemaking.

The Motor Carrier Act of 1980 targeted ratemaking as an area for reform and stated that a freely competitive pricing system would enhance productivity in the motor carrier industry. In order to properly evaluate the collective ratemaking process and determine the impact of eliminating antitrust immunity from collective ratemaking, Congress established the Motor Carrier Ratemaking Study Commission to make these evaluations. The Commission has a mandate to report its findings to the President and the Congress by January 1, 1983.

We fully support the establishment of a free and competitive pricing system for the motor carrier industry, one that is responsive to market conditions. In our view, such a pricing system would tend to improve the quality of motor carrier service, encourage entry into motor carrier service, and provide for more efficient use of motor carriers. The NAM bases its position on the results of a sample of its members taken to assess the impact of the Act's reforms on motor carrier service. Although the information collected was provided to NAM by its members on a confidential basis, the summary demonstrates that the stimulus of marketplace competition has effected broad service improvements and rate reductions. The sample also supports the view that the removal of entry restrictions and the elimination of antitrust immunity from collective ratemaking will encourage and expand competition in the motor carrier industry.

Those opposing the elimination of antitrust immunity contend that the existing temporary excess trucking capacity and the stagnant economy are good reasons for retaining the collective ratemaking process. The NAM response to this argument is that with a foreseen improved economy, demand for motor carrier service will rise causing collectively-set rates to rise as well. This artificial relationship between price and demand hampers the naturally competitive aspects of motor carrier service and would tend to do so to a greater degree in a period of economic revitalization. The improvement in motor carrier competition which has occurred since passage of the Act indicates that the elimination of rate regulation will serve the promotion of competition in the industry.

These same opponents argue further that collective ratemaking will tend to ensure rate stability and provide shippers equal access to motor carrier service. The NAM discounts these arguments as illusory. First, with respect to rate stability, the NAM believes that the establishment of a free and competitive pricing system will lead naturally to simplification of tarriffs and other reforms to assist the motor carrier rate bureaus in their important public function. We believe also that the "new" consideration of price in carrier service solicitation will provide more incentive for marketing innovations leading in turn to greater stability. Finally, it is difficult for us to imagine a concept more stable than that of rates approximating the costs of providing service.

Second, with respect to equal access, the opponents maintain that collective ratemaking tends to ensure motor carrier service to smaller rural communities through cross-subsidization arrangements under which revenues earned on profitable urban routes are used to offset the loss of revenues incurred on less profitable rural routes. The Act required the ICC to study the availability and quality of motor carrier service in small communities and assess the small community impact of the Act's provisions. The study concluded that pre-Act fears that carriers would abandon service to small communities are without foundation. Moreover, the NAM sample reveals very little disruption to shipments to and from smaller rural communities. In fact, small community shippers invariably pay the highest prevailing rates and so carriers are generally quite willing to provide them with service. The collective ratemaking process fails to consider the special business relationship that exists between carrier and shipper.

In two appearances before the Motor Carrier Ratemaking Study Commission, the NAM urged the Commission to recognize the need to eliminate antitrust immunity from collective ratemeaking in the Commission's report to the President and the Congress. We ask the Chairman and the Subcommittee members to be receptive to such a proposal as a much needed reform in keeping with the purpose and intent of the Motor Carrier Act—to strengthen the motor carrier industry and make it more productive. During the 98th Congress, we would like to see a legislative proposal to eliminate antitrust immunity from collective ratemaking enacted and we will continue to work with the Chairman and members of the Subcommittee to bring about this result.

STATEMENT OF RICHARD G. VELTEN ON BEHALF OF THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC. AND THE DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE, INC.

My name is Richard G. Velten. I am the First Vice President of the National Small Shipments Traffic Conference, Inc. (NASSTRAC) and I am also a member of the board of directors of the Drug and Toilet Preparation Traffic Conference, Inc. (D&TPTC).

These two groups have a combined membership of hundreds of large and small shippers of freight via motor carriers and have previously participated in legislative hearings relating to the surface transportation industry. These groups are also very active in proceedings before the Interstate Commerce Commission relating to the regulation of that industry. Our primary concern is with the rates and charges on small shipments, i.e., all less-than-truckload (LTL) shipments under 10,000 pounds. We appreciate this opportunity to give testimony relating to the Commission's actions or inactions since the Motor Carrier Act of 1980.

I must begin by expressing the complete frustration felt by the members of NASSTRAC and D&TPTC with regard to the failure of the Interstate Commerce Commission to regulate the motor carrier industry in the manner intended by the Congress. As shippers who tender vast numbers of small shipments to the motor carrier industry, we are particularly concerned with the Commission's unwillingness to enforce its responsibilities under the Interstate Commerce Act to ensure that rates do not exceed a reasonable level. We are also concerned with the Commission's decisions to deregulate specific areas of shipper-carrier relations in a manner not contemplated by the statutes under which it operates. In brief, we are fed up and we ask the Congress to do whatever is necessary to require the Interstate Commerce Commission to do the job mandated by existing law.

It seems ironic that at a time when the motor carrier industry finds itself alienated by the Commission's actions that the shippers should also be so frustrated. The key appears to be that the Commission is refusing to administer the Act and its rulings are as if Congress had repealed the Act rather than modified it. The question the Commission seems to be asking itself as each issue comes along for decision is: What would be the result here if there was no ICC Act at all at this time? The Commission then decides each case to bring about the same result as if there were no statute on the books.

RATE INCREASES ON SMALL SHIPMENTS

The ICC's current approach to rate regulation is a complete disaster. During the past year, the ICC has consistently refused to suspend general increases proposed by motor carrier rate bureaus on small shipments traffic that have been far in excess of the rate of inflation and of the carriers' claimed expense increases. Time and again, the Commission has allowed small shipment increases to take effect in order to subsidize rates on large shipments that do not even equal the carriers' expenses before interest and taxes.

The introduction of some 8,000 new motor carriers under the relaxed entry guidelines of the Motor Carrier Act of 1980 has not been any bonanza for shippers of small shipments. These new carriers usually do not have the terminal facilities or capital necessary to service the LTL market. Accordingly, they are drawn into the industry to serve only truckload (TL) shipments. And, these new carriers' diversion of TL traffic from the general commodity carriers has facilitated the exit of some 250 major LTL carriers, including leading carriers such as Cooper-Jarrett, Spector-Red Ball, Wilson, etc. As a result, there are fewer carriers available today to compete for LTL traffic and the status of small shipment shippers as captive shippers has been solidified. Attached hereto as Appendix A is a summary of the general freight rate increases approved by the Commission for several of the motor carrier rate bureaus this year. Beyond the huge dollar amounts involved, the most striking elements of these increases have been that: (1) they have greatly exceeded the rate of inflation this year (6 percent); and (2) they have been heavily weighted upon small shipments traffic, the traffic that is captive to the motor carrier industry.

Nor should it be assumed that the Commission's approval of these increases was based on evidence showing that various weight brackets were being equitably treated by the motor carrier rate bureaus. For example, the recent general increase proposed by the Central & Southern Motor Freight Tariff Association was "defended" with evidence establishing that the operating ratio (expenses divided by revenues) on traffic weighing 1,000 to 4,999 pounds would be 85.9, while the operating ratio on shipments weighing 5,000 to 9,999 pounds would be 97.9. In other words, the carriers admitted that they wanted profits of 14.1 cents for every revenue dollar on one weight bracket, but only 2.1 cents for every revenue dollar on another weight bracket [5 cents is the normal "profit margin" for this industry] and the Commission still refused to suspend this rate increase.

It should be borne in mind that the rate bureaus' antitrust immunity remains in effect and that these rate increases were made collectively. By ignoring its rate review function under these circumstances, the Commission has created a serious imbalance between carriers and shippers which is not contemplated by the Motor Carrier Act.

The Motor Carrier Act of 1980 continued in effect without modification the requirement that rates be reasonable and that they be nondiscriminatory. There was no change enacted by Congress to terminate effective review and control of excessive rate increases. What is needed now is additional Congressional action to force the Commission to recognize these standards in its consideration of motor carrier general increases to prevent unreasonable burdens from being imposed on small shipments traffic.

RELEASED RATES

The Commission's regulation of the carriers' tariff provisions relating to loss and damage is another example of its unwillingness to follow its statutory mandate. On March 23, 1982, the Commission served a decision in No. 38752, Petition for Declaratory Order on Deductibles in Household Goods Released Rates which allows motor common carriers and household goods carriers to include deductibles from loss and damage claims in their tariffs. This decision was issued in spite of the fact that (1) the Motor Carrier Act of 1980 did not change the limited exception to full value rates, continuing only the publication of rates based on declared or "released" value and (2) the Staggers Act added specific language allowing deductibles only for railroads in 49 U.S.C. 10730. This is a good example of how the Commission thinks that it can do whatever it wants, so long as it is in the name or "deregulation", and deregulation is being equated with ignoring the statute.

Similarly, the Commission's November 15, 1982, decision in No. FF-305, Transconex, Inc.—General Commodities, approved a "released value" provision in a carrier's tariff that: (a) applied to all commodities; (b) bore no relationship to the varying susceptibility to loss or damage of the thousands of different articles involved; and (c) provided an unreasonably low level of limited liability at $50.00 per shipment (this would be 10 cents per pound on a 500 pound shipment and 1 cent per pound on a 5,000 pound shipment). Clearly, these provisions do not comply with the statutory requirement that the released value be reasonable under the circumstances surrounding the transportation and the Commission's decision also ignored each of the standards it has developed over the years to determine whether released value provisions conform to the Act.

ARBITRARIES

"Arbitraries" have been defined by the Commission to be "additions to line-hual rates, made to cover special or unusual services, such as for bridge or other river crossings". They are plus charges added over and above the maximum reasonable rates to apply to or from specific cities or places. When such additional charges are cost-justified, the members of NASSTRAC and D&TPTC have no objection. However, these Conferences do object to the Commission's current practice of allowing the publication of such arbitraries without any cost justification.

It must be recognized that the flood of arbitraries allowed by the Commission within the last two years has not been for new services performed by the carriers. To the contrary, the publication of these arbitraries is a form of disaggregation of rates. That is, the carriers' linehaul rates contemplate complete services and the carriers are now publishing extra charges to cover some of these same services. The standard rule of law governing disaggregation, mandated by a decision of the Supreme Court in the *Wichita Board of Trade* case, has been that when a carrier proposes a new charge for a service previously covered by a line-haul rate it must prove two things: that the charge for the separate service is reasonable and that the line-hual rate is reasonable for the remaining services. Contrary to this decision, the Commission is not requiring the carriers to fulfill their burden of proof on either point and captive LTL shippers are being forced to pay these extra charges on shipment to many small communities.

SECRET RATES

It is beyond question that the single most important reason for the Act to Regulate Commerce in 1887 was to prevent the type of discrimination then present in the railroad transportation industry. The anti-discrimination theme of the original Act has been maintained by Congress in the current statute. However, the Commission has embarked on a policy of allowing individual motor contract carriers an exemption from the tariff publishing requirements of the Act and it is now considering a blanket exemption for all contract carriers. If there is to be any semblance of even-handed regulation, shippers are entitled to know the rates their competitors are paying and the Commission must also have this knowledge if it is to enforce the anti-discrimination provisions of the Act. If the Commission is allowed to continue its present course, we undoubtedly will be faced with the abuses of the 19th century.

THE ELIMINATION OF UNIFORM DETENTION RULES

The lack of concern with discrimination between shippers being shown by the current Commission is exemplified by its recent decision in Ex Parte No. MC-88, *Detention of Motor Vehicles—Nationwide*. In that case, the Commission totally eliminated its uniform rules governing detention of motor vehicles and the charges for such detention, thus opening wide the gates to a flood of discriminatory proposals. In doing so, the Commission stated: In summary, we conclude that under the current regulatory environment, the public interest will better be served by eliminating . . . uniform rules and allowing all carriers to issue their own, nondiscriminatory . . . rules in their respective tariffs.

This conclusion shows how the Commission is not basing its decisions on the Interstate Commerce Act. On the contrary, decisions are now being based vaguely on the Commission's perception of the "current regulatory environment" rather than the statute. Further, the Commission's decision was totally unrealistic in that it nowhere admits its inability and unwillingness to examine individual motor carrier tariffs to determine whether the detention rules adopted are, in fact, nondiscriminatory. In other words shippers are being faced with the worst of all possible worlds; A Commission that vacates uniform rules; a Commission that does not have the manpower to examine carrier tariffs to root out discriminatory provisions; and a Commission that would refuse to suspend any rule challenged by a shipper on the ground that Congress wants the carriers to exercise maximum flexibility.

ELIMINATION OF NOTICE OF INDEPENDENT INCREASES

The Commission's consistency in ignoring the disclosure requirements of the Motor Carrier Act is further illustrated in its Ex Parte 297 (Sub-No. 5) decision which permits carriers to hide independent action increases from shippers by refusing to allow the rate bureaus to publish notice of those increases until the rate becomes effective. While the Commmission defended this decision on the ground that it was procompetitive, the reality of the situation is that carriers are now allowed to publish increases in rate bureau tariffs with the knowledge that most shippers will not learn of them until they receive bills for actual shipment.

The vast increase in the number of individually published tariff items in rate bureau and individual tariffs has made it difficult for shippers to choose the most economical method of shipping their freight. That is, unless a shipper is willing to go through extensive tariff research prior to tendering every shipment to a common carrier, which is a practical impossibility, it really cannot know what it is going to be charged for its shipments. Some of our most sophisticated members have reported that they first learned of massive rate increases or arbitraries when they received freight bills for specific shipments. The Commission has exacerbated this problem by allowing rate bureaus to publish blanket rules to the effect that the rates in their members' individual tariffs take precedence over the rate bureau tariff rates. In some instances the carriers have charges in individual tariffs that are double those published in the rate bureau tariffs. One suggested solution would be to require carriers to adhere to their lowest rate or charge, whether provided in the rate bureau tariff or in their individual tariff. Such a rule would be pro-competitive, as it would in no way restrain the lower rates, yet it would prevent excessive charges and post-shipment rate surprises. The Commission should be able to see how unfair and unreasonable it is to allow a rule which allows the higher of two rates published by a carrier to apply. Yet it is ignoring its duty to require reasonable rates and to require tariffs that are usable by the shipping public.

NOTICE TO SHIPPERS OF UNCLAIMED FREIGHT

Yet another example of the current trend at the Commission to accomplish its own form of deregulation is its termination of the Ex Parte No. 372, Notice to Shippers of Freight Refused or Unclaimed at Destination proceeding. In 1979, the Commission proposed the adoption of rules governing the type of notice that carriers must give shippers when their freight is refused or unclaimed at the destination. While the proposed rule may not have been perfect, it at least attempted to address the problems experienced by shippers for many years. Fully two years after receiving comments from the public on this issue, the Commission has simply issued a notice saying that the Motor Carrier Act of 1980 had made the proposed regulations unnecessary. Since the Act did not address the questions at issue in Ex Parte No.

372, what the Commission was really saying is that its interpretation of the Act is that Congress did not want it to impose any uniform rules on the motor carrier industry because such rules might stifle competition. NASSTRAC and D&TPTC cannot agree with this interpretation. While the Motor Carrier Act of 1980 was clearly designed to enhance competition, it was not designed to cease all Commission activities for the protection of the shipping public when those activities have been proved necessary by years of the carriers' failure to deal with specific problems. As its next step, the Commission may have in mind to take the speed limits off the highways to allow "market forces" to set the speed limits.

CONCLUSION

This description of the Commission's total disregard for the statutory scheme of regulation of the motor carrier industry was not designed to be all-encompassing. Rather, what we have attempted to do is to establish, through examples, the fundamental problem with Interstate Commerce Commission regulation of the motor carrier industry today, the fact that it has become a rule by fiat, rather than a rule of law. The current Commission appears to believe that there was a hidden message in the Motor Carrier Act of 1980, a signal to the Commission to go farther than the law in order to completely deregulate the motor carrier industry on its own, but to do so in a slow enough manner so as not to create an immediate disruption in the industry. As Chairman Taylor recently put it:

"In closing, let me say that during my tenure at the I.C.C. *we* have opted for meeting the challenge of deregulation—and rest assured that it really is a challenge—by treating what can only be characterized as a volatile situation with as much care and forethought as *we* can muster. Consequently, although *we* have kept moving down the deregulatory path, *we* have endeavored to do so in a manner and at a pace calculated to minimize disruption for the industries which have been subject to the heavy burden of regulation for so many years. (Remarks of Chairman Reese H. Taylor, Jr. before the New York ICC practitioners, November 16, 1982; emphais added)."

Congress must reaffirm and reemphasize the point it attempted to make in section 3 of the Motor Carrier Act of 1980, that it is not the Commission that has the right to opt for deregulation. Rather, it is Congress' right to determine the nature of regulation of the surface transportation industry.

APPENDIX A

GENERAL INCREASES BY RATE BUREAUS—1982

[Percentage increases by weight brackets]

Rate Bureau and date of increase	Minimum charge	0 to 500	500 to 1,000	1,000 to 2,000	2,000 to 5,000	LTL 5,000 and over	TL
Central and Southern:							
Feb. 1, 1982	1.0	1.0	1.0	1.0	1.0	1.0	1.0
Apr. 1, 1982	10.0	10.0	10.0	7.1	7.1	7.1	2.5
Apr. 12, 1982	1.94	1.94	1.94	1.94	1.94	1.94	0
Oct. 27, 1982	8.0	8.0	8.0	4.0	4.0	2.0	0
Compounded total	22.3	22.3	22.3	14.68	14.68	12.48	3.53
Central States:							
Apr. 1, 1982	8.3	8.3	8.3	8.3	8.3	8.3	4.5
Nov. 2, 1982	10.0	10.0	8.0	5.0	3.5	2.0	2.0
Compounded total	19.13	19.13	16.96	13.72	12.09	10.47	6.59
Eastern Central:							
Apr. 1, 1982	6.5	6.5	6.5	6.5	6.5	6.5	4.5
Nov. 8, 1982	8.0	8.0	8.0	8.0	8.0	8.0	3.0
Compounded total	15.02	15.02	15.02	15.02	15.02	15.02	7.64
Middle Atlantic:							
Feb. 8, 1982	2.7	2.7	2.7	2.7	2.7	2.7	0.7
Apr. 1, 1982	7.0	7.0	7.0	7.0	7.0	7.0	5.5
Nov. 22, 1982	2.0	2.0	2.0	2.0	2.0	2.0	2.0

GENERAL INCREASES BY RATE BUREAUS—1982—Continued

[Percentage increases by weight brackets]

Rate Bureau and date of increase	Minimum charge	0 to 500	500 to 1,000	1,000 to 2,000	2,000 to 5,000	LTL 5,000 and over	TL
Compounded total	12.09	12.09	12.09	12.09	12.09	12.09	8.36
Middlewest:							
Apr. 1, 1982	7.0	7.0	7.0	7.0	7.0	7.0	5.0
July 31, 1982	12.0	10.0	6.0	6.0	6.0	2.0	0
Apr. 13, 1982	1.44	1.44	1.44	1.44	1.44	1.44	1.44
Compounded total	21.57	19.39	15.05	15.05	15.05	10.71	6.512
Southern:							
Apr. 1, 1982	7.9	7.4	7.4	7.4	7.4	7.4	1.5
Apr. 13, 1982	2.4	2.4	2.4	2.4	2.4	2.4	4.9
Nov. 15, 1982	8.0	8.0	8.0	2.0	2.0	2.0	1.0
Compounded total	19.33	18.78	18.78	12.18	12.18	12.18	7.54

STATEMENT OF WILLIAM J. AUGELLO, EXECUTIVE DIRECTOR/GENERAL COUNSEL, SHIPPERS NATIONAL FREIGHT CLAIM COUNCIL, INC.

On behalf of the membership of the SNFCC, consisting of over 800 national corporations interested in the improvement and preservation of carrier liability standards and the reduction of loss and damage claims which amount to over one billion dollars a year, I wish to thank the Committee for this opportunity to address the liability problems arising from enactment of the Motor Carrier Act of 1980.

The problems with which we are concerned fall into three categories:

(1) Those created by Congress in its enactment of the legislation,

(2) Those created by The Interstate Commerce Commission in its interpretation and implementation of The Act, and

(3) Those requiring Congressional action in the public interest.

LIABILITY PROBLEMS CREATED BY ENACTMENT OF THE MOTOR CARRIER ACT OF 1980

A. Introduction of "Deductibles" Into Bailment Contracts

When Congress repealed the I.C.C.'s jurisdiction over the prior approval of released rate filings of motor carriers, it unwittingly created a situation which has resulted in the filing of insurance-type "deductible" clauses in contracts of carriage. However, this result could not have been foreseen by Congress: it was permitted to take place by the I.C.C.'s unlawful interpretation of The Motor Carrier Act of 1980 and the improper imposition of its marketplace concepts which far exceed the Congressional intent.

The introduction of deductibles into motor carrier contracts, which shall have disastrous consequences for the nation's commerce for decades to come, was made possible by the following events:

(1) In 1920, Congress enacted Section 20(11) of The Interstate Commerce Act (commonly known as the Carmack Amendment) prohibiting common carriers from limiting their liability against their negligent acts unless the I.C.C. approved a released rate offering a lower rate for limited liability. (See Appendix A)

(2) On October 17, 1978, this section was recodified by P. Law 95-473, at 92 Stat. 1389 and 1453 without changing its substance. (See Appendix B)

(3) On July 1, 1980, Congress eliminated the I.C.C.'s jurisdiction to approve motor common carrier released rates, but preserved that power with respect to household goods carriers and freight forwarders. Motor Carrier Act of 1980 P. Law 96-296, 94 Stat. 802. (See Appendix C-1)

(4) On October 14, 1980, Congress further revised Sec. 10730 by adding a new subsection for railroads, and introducing the concept of "deductibles" into railroads released rates. Staggers Rail Act of 1980, P. Law 96-448, 94 Stat. 1911. (See Appendix C-2)

(5) On March 3, 1980, a household goods carrier filed a released rate application which included a deductible provision. *Docket No. FF-303, Interstate International, Inc., Used Household Goods.* The I.C.C. allowed the rates to become effective over

protests of our Council and other shipper groups. That decision was appealed in The Second Circuit Court of Appeals and is awaiting a decision. *Shippers National Freight Claim Council, et al.* v. *I.C.C. & U.S.*, No. 80–4243, Second Circuit Court of Appeals.

(6) On March 23, 1982, the I.C.C. issued a declaratory order to the effect that motor carriers may also include deductibles in their released rate agreements. *Docket No. 38752, Petition For Declaratory Order on Deductibles in Household Goods Released Rates.* This issue was added to the appeal of the I.C.C.'s decision on household goods deductibles although no specific motor carrier released rate was filed at the time.

(7) On or about May 14, 1982, two motor carriers filed rates on tools which included a $200 deductible. (One was rejected by the I.C.C. on technical grounds and the other became effective although defective for the same reasons.)

IT IS OUR COUNCIL'S POSITION, as well as other shipper interests, *that Congress did not intend motor carriers or household goods carriers to be permitted to include deductibles in their released rate agreements with shippers* and that they should not be permitted to file such provisions. This position is founded on the following:

(a) The specific statutory terms used on 49 U.S.C. 10730(c) to authorize deductibles govern railroads only, and are not used in sub-sections (a) or (b) in connection with household goods or motor carriers, although all three sub-sections were modified or enacted between July and November 1980. This is a clear expression of Congressional intent not to permit carriers other than railroads to use deductibles.

(b) The establishment of a maximum value was contemplated by Congress in enacting the Carmack Amendment, not a deductible. This conclusion is evidenced by the phrase "not exceeding the value so declared or released" in the second provision of Sec. 20(11). (See Appendix A)

(c) No justification may be found in the legislative history of any of the 1980 deregulation acts to support a finding that Congress intended any mode of transportation other than railroads to utilize deductibles in released rate agreements.

(d) No carrier of any type, for the past 60 years, has interpreted The Carmack Amendment or the common law as permitting deductibles in a bailment situation.

(e) Deductibles are inappropriate when the goods involved are transferred to the carrier for its safekeeping.

On the other hand, deductibles are common in insurance contracts where the owner of the goods retains possession and weighs the risk of his loss or damage against a lower or higher premium.

(f) Deductibles in a common carrier environment equates to a "license to steal". When the amount of the deductible in the bill of lading becomes known to employees physically handling a shipment, theft and pilferage up to that amount will unquestionably proliferate. The reason is that no claim can be filed for losses under the amount of the deductible, no investigation will be conducted by the carrier, and the risk of detection and prosecution will be removed. Honest employees will soon join the ranks of professional thieves.

In sum, deductibles have no legal or logical place in bailment contracts and our Council is committed to seek repeal of this provision in rail agreements. In the interim, we urge that Congress prohibit the spread of this concept to other modes of carriage, and thus avoid wholesale theft and pilferage of the nation's commerce, the cost of which will be passed on to consumers in the form of higher retail prices. Our manufacturers will soon find themselves facing serious competition from goods stolen in transit.

Marketplace competition from thieves may find acceptance among our "marketplace" economists, but it should not be a part of our National Transportation Policy.

Congress created this problem by introducing deductibles into railroad contracts and the I.C.C. compounded the problem by unlawfully extending this concept to motor carriers and household good carriers. We fully expect the courts to rectify the Commission's erroneous interpretation of the statute, failing which Congress must clarify its intent by adding a new paragraph to Sec. 10730 as follows:

"(d) Deductibles may only be included in written agreements between railroads and shippers."

B. Repeal of Anti-Trust Immunity on Collectively-Made Released Rates

One of the less-publicized changes made in the Motor Carrier Act of 1980 was the repeal of anti-trust immunity for collectively-made released rates.

In a rare display of unanimity, shipper and motor carriers have concluded that this change was ill-advised and has produced results contrary to the Congressional intent.

A coalition of shipper and carrier associations has presented position statements to the Congressional Committees responsible for transportation, urging the repeal of 49 U.S.C. 10706(b)(3)(C). (See Appendices D and E) Negotiation of new released rates with individual carriers has virtually ceased since July 1, 1980, and as a result, it is estimated that shippers are paying $50 to $100 million more annually than could have been paid under collectively-negotiated released rates.

This section of the M.C.A. of 1980 should be repealed forthwith rather than await Congressional action on January 1, 1984.

C. Change the Time Standard which Starts the Suit-Filing Time Limit on Declined Claims

Section 11707 was amended in the Motor Carrier Act of 1980, the first amendment to the Carmack Amendment in 50 years. Sec. 11707(e) provided that the date a claimant receives a disallowance letter from a carrier starts the running of the two-year time limit to institute suit. (See Appendix F.) It is clear that Congress intended that the date of receipt be the determining act. (See House Report 96–1069, p. 40, reproduced in Appendix F.)

However, one month earlier, the Judiciary Committee amended the same section by providing that the date the carrier "gives" such notice starts the running of the time limit. P. Law 96–258, 94 Stat. 427, June 3, 1980 (The Codification Improvements Law). The latter version now appears in the U.S. Code (Appendix G) although the Motor Carrier Act of 1980 was enacted one month later. The "giving" of a disallowance is ambiguous and causes unnecessary conflict and litigation.

The language enacted in the Motor Carrier Act of 1980 must be restored on equitable grounds, if on none other. Since the date of carrier's receipt of a claim governs whether the claim has been timely filed, it would be illogical not to apply the date of receipt by a claimant of a carrier's declination to start the two years suit-filing time limit. Whatever function is chosen (the mailing date or date of receipt), it should be the same for carriers as it is for claimants.

The Council respectfully submits that the date of receipt is the more logical and equitable to apply to the mailing of time-sensitive claim documents. Remedial legislation should be enacted to rectify this conflict and ambiguity. The amendment needed to accomplish this result is as follows:

"A carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less time than 2 years for bringing a civil action against it under this section. The period for bringing a civil action is computed from the date that person receives written notice from the carrier than it has disallowed any part of the claim specificed in this notice."

This is an important amendment because millions of dollars are lost annually by claimants for failure to institute suit within two years of a disallowance, much of which is caused by not knowing when the time limit began to run.

D. Amend the Disallowance Criteria

Another change in the Carmack Amendment enacted in the Motor Carrier Act of 1980 was the requirement that carriers notify the claimant that an offer to pay only a portion of the claim was a disallowance of the remaining portion of the claim. (See Section 11707(e). Appendix F)

Although this amendment has proven to be of great benefit to the shipping public, two additional changes are needed to correct defects of the type which induced Congress to define disallowances for the first time in 1980:

(1) Section 11707(e) applies only when a carrier makes a partial offer of compromise. When disallowing the entire claim, carriers need not provide their reasons.

(2) There is no requirement that the reasons provided by carriers for their disallowances be valid or lawful.

Many disallowances are received by claimants which are frivolous, improper, unlawful and are given simply to delay resolution of valid claims in hopes that the claimant will tire and eventually write the claim off as uncollectible. A more common reason for frivolous declinations is to start the running of the two-year time limit for instituting suit in the expectation that the claim will become time barred.

For example, motor carriers frequently disallow claims on the ground that:

1. One or more documents are missing (a practice declared by the I.C.C. to be improper in answer to Question No. 11, Ex. Parte 263, Order dated April 18, 1972.)
2. The amount of loss is not determined and stated within nine months (a practice declared by the I.C.C. to be improper in answer to Question No. 1, Ex. Parte 263, Order dated April 18, 1972.)
3. The claimant has failed to furnish evidence that the carrier's negligence caused the loss (a practice which is in conflict with the common law burdens of proof);

4. It has concluded that there is no carrier liability, either without conducting an investigation or without stating the facts upon which that conclusion is founded (as required in 49 C.F.R. 1005.4);

5. A connecting carrier caused the loss (Sec. 11707 makes originating and delivering carriers jointly and severally liable for all losses incurred en route, regardless of the ability of the carrier against whom the claim is filed to collect from the responsible carrier).

These and other improper disallowances would be quickly reduced by providing that the two-year time limit for instituting suit will not begin to run unless the carrier provided a "'lawful" reason for its position.

The amendment needed to accomplish this objective is as follows:

"(1) disallowances in whole or in part by carriers or their agents shall not start the running of the time limit to institute a suit unless the carrier, in writing, provides a lawful reason for said disallowance;

(2) an offer of compromise shall not constitute a disallowance of any part of the claim unless the carrier, in writing, informs the claimant that such part of the claim is disallowed; and

(3) communications received from a carrier's insurer shall not constitute a disallowance of any part of the claim unless the insurer, in writing, informs the claimant that such part of the claim is disallowed, provides lawful reasons for such disallowance, and informs the claimant that the insurer is acting on behalf of the carrier."

E. Codify the Common Law Requirement for a Choice Between Full Value and Reduced Liability Rates in 49 U.S.C. 10730

An unfortunate choice of the word "may" in Section 10730(b)(2) has created the unintended impression that carriers may publish released rates without offering shippers the option of shipping at the prevailing full liability rate. (See Appendix C-1, subparagraph (b) (1) and (2))

The I.C.C. recognized this flaw in connection with released rates by railroads, stating:

"By this notice we are also reminding shippers and carriers that the new authority to publish limited-value rates without prior Commission approval does not in any way remove the carrier obligation, under the Interstate Commerce Act, to maintain full-value rates when shippers do not agree to released rates or where they desire full value as well as released rates. We do not view this as a problem for carriers. Existing full value rates may be complemented by released rates. So long as shippers have a choice between full and released value rates, there is no need to receive prior shipper approval for publication of the released rates (although it would still be subject to protest on other grounds such as unreasonableness.)" Ex. Parte No. 390, Rail Rates Based on Limited Liability, December 22, 1980.

A choice of full value vs. limited value rates is mandated by public policy. *Adams Express Co.* v. *Croninger,* 226 U.S. 491 (1913)

The National Motor Freight Traffic Association agrees that this choice is mandatory, not permissive. (See Testimony of James C. Harkins, Exec. Dir. of N.M.F.T.A. before the Senate Committee of Commerce, Science and Transportation, July 9, 1981 and before this Committee's Surface Transportation Subcommittee on June 11, 1981.)

The solution is to amend Sec 10730(b)(2) to read as follows:

"(d) Before a carrier may establish a rate for any service under this section, the Commission *shall* require such carrier to have in effect and keep in effect, during any period such rate is in effect, a rate for such service which does not limit the liability of the carrier. The rate to be offered for limited liability shall be lower than the rate previously maintained for full liability."

F. Exemptions From Regulatory Control of Liability Issues

The prime objective of the Carmack Amendment was to "bring about a uniform rule of responsibility as to interstate commerce and interstate commerce bills of lading." *Atchison, T. & S. F. Ry.* v. *Harold,* 241 U.S. 371 (1916)

The purpose was to free interstate shipments from the diversity of legislative and judicial holdings that made it difficult for shippers and carriers to know the extent of the carrier's responsibility for goods delivered to it for transportation from one state to another. *Adams Express Co.* v. *Croninger,* 226 U.S. 491 (1912)

Nothing has changed since the early 1900's to suggest that the nation's commerce no longer needs uniform liability rules and uniform bill of lading contract terms and conditions for the orderly conduct of its interstate commerce. On the contrary, there is a greater need today for reasonable, uniform liability rules among modes of carriage and on intermodal movements.

There is a great danger, however, that the shipping public may lose uniform liability rules in the deregulation process either through legislative or administrative action. For example, in the Motor Carrier Act of 1980, Congress exempted all motor carrier traffic having a prior or subsequent movement by air, 49 U.S.C. 10526(8)(B), and the transportation of used containers and decorative rock and wood chips, 49 U.S.C. 10526 (11), (12), and (13).

The Interstate Commerce Commission has extended the commercial zones of municipalities to as much as 20 miles from the corporate limits. 49 C.F.R. 1041, 1048. All of these classes if traffic, along with previously exempted traffic, move without the protection of the Carmack Amendment or uniform contracts and liability rules.

The I.C.C. is also considering requesting Congress for blanket authority to exempt specific classes of traffic similar to the authority granted to it by Congress with respect to railroad traffic in 49 U.S.C. 10505.

Our Council respectfully submits that the public interest would best be served by subjecting all motor carrier traffic to the Carmack Amendment.

Furthermore, if the I.C.C. is given discretionary power to exempt classes of traffic, the provisions of 49 U.S.C. 10505(e) must be extended to apply to motor carrier traffic, with some modifications. For instance, Sec 10505(e) provides that "No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistant with the provisions of section 11707 of this title."

Reference to Sec. 10730 was apparently inadvertedly omitted. Although Sec. 11707. refers to Sec. 10730, specific reference to Sec. 10730 should be added for clarity.

Sec. 10505(e) continues: "Nothing in this subsection or section 11707 of this title shall prevent rail carriers from offering alternative terms nor give the Commission the authority to require any specific level of rates or services based upon the provisions of section 11707 of this title."

The I.C.C.'s jurisdiction over the reasonableness of rail rates differs substantially from its powers with respect to motor carrier rates, and therefore, this sentence would be inappropriate in any motor carrier legislation. Shippers would prefer that if any legislation is enacted on this issue, that it be stated in the affirmative rather than in the negative.

Furthermore, the Commission's power to rule on the reasonableness of full value rates *must be retained*. As the Commission observed in its landmark decision in Ex Parte 263, Rules, Regulations and Practices of Regulated Carriers with Respect to the Processing of Loss and Damage Claims, 340 I.C.C. 515 (1972), at 519:

"Complications in the processing of claims against carriers, however, arose when the Supreme Court held in *Adams Express Co.* v. *Croninger,* 226 U.S. 491, 509–510 (1913), that a carrier could under the Carmack Amendment 'by a fair, open, just and reasonable agreement limit the amount recoverable by a shipper in case of loss or damage to an agreed value made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of the risk * * *.' Following the *Croninger* case and other similar court decisions, many railroads began to publish reduced rates based on agreed values and *prohibitively high rates based on actual values of commodities shipped.* The net result of this was that shippers had no effective choice of rates and were denied full and fair recovery for shipments lost or damaged in transit.

Inasmuch as common carriers are liable as carriers and bailees, they are fully responsible for the consequences of their own negligence or want of skill and also for whatever else may happen (save the above exceptions and those applicable only to water carriers) to the property while it is in their possession. The rigid liability thus imposed may not arbitrarily be avoided by the carrier, but it it may be limited for a consideration provided we give our prior approval under the released rates provision of section 20(11) of the act. Even so, the problems of carriers attempting to limit their liability arbitrarily and by other means seem to have continued almost unabated. The rules adopted by rail and motor carriers and freight forwarders . . . which prompted the filing of the petition in docket No. 35198, and the other relevant carrier practices with which we are concerned in this proceeding, *appear to represent the latest efforts by carriers in this time-honored endeavor.* (Emphaisis added).

Current conditions in transportation make it even more imperative that the Commission continue to monitor and judge the reasonableness of the choices given to shippers when full and limited value rates are published. The Commission apparently agrees. See, for instance, its comments with respect to its lack of such power on rail rates in Ex Parte 403, Rail Cargo Liability Study-Report to Congress, October 9, 1981:

"Thus, although rail carriers are required to offer full value rates in which their liability is not limited, where dominance is not deemed to exist *the ICC is virtually powerless to prohibit the carriers from setting their full value rates at an unreasonably high level, so as to force shippers to either accept lower priced released rates* (which limit the carrier's liability), or take their traffic elsewhere. p. 16

* * * * * * *

Arguably, a carrier who raises its full value rates to prohibitively high levels to force shippers to accept released rates may be engaging in an unreasonable practice in violation of 49 U.S.C. 10701(a). However, *without jurisdiction over the rate level it would be difficult for the Commission to remedy this practice.*" p. 17

* * * * * * *

And in its Conclusions, at p. 63, the Commission states: "Without a clear Congressional statement to the contrary, the Commission will continue to requrie rail carriers to offer full value rates. *However, the Commission wishes to point out to Congress that in the absence of market dominance, the only effect of this requirement may be the publication of excessively high full value rates in those cases where rail carriers choose to limit their liability.* However, where market dominance exists, the Commission has jurisdiction to ensure the reasonableness of the total transportation package offered. Thus, where the Commission holds jurisdiction over rate reasonableness, it can ensure that full value alteratives are not offered at unrealistic rate levels. Hence, we do not recommend that the requirement that carriers offer full value rates be repealed." (Emphasis added)

Accordingly, we urge that if any exemption powers be given to the Commission, that Congress

(1) Prohibit exemption from Section 10730 of 11707, (as it did in Sec. 10505(e), and

(2) Preserve the Commission's power to rule on the reasonableness of the difference between full value and limited value rates.

OTHER LEGISLATION NEEDED

In addition to the foregoing examples of remedial legislation required in the public interest, the Council urges Congress to consider enacting the following legislation related to carrier liability.

A. Jurisdictional Limits on Federal Courts

Effective October 20, 1978, the Committee on the Judiciary succeeded in imposing a $10,000 limitation on the jurisdiction of the federal district courts over loss and damage claims suits. P. Law 95-486, 92 Stat. 1633. The reason for this revolutionary change was the overburdening of the federal courts in Boston with suits on fresh produce moved by rail.

As a result, claimants and carriers are deprived of uniform federal court decisions of all interstate commerce freight claim litigation under $10,000.

The I.C.C. recommended that this change in the law be repealed. *Ex Parte 403, Rail Cargo Liability Study,* October 19, 1981, pages 40 and 63.

The Council urges that the Committee adopt the I.C.C.'s recommendation to amend 28 U.S.C. 1337 accordingly.

B. Arbitration of Property Claims

Congress enacted the first arbitration statute for transportation claims when it enacted Sec. 11711 of Title 49 in the Household Goods Act of 1980, P.L. 96-454, October 15, 1980. The need for a dispute settlement program for property claims is as urgently needed as was the need for household goods claims. The reason is that carriers have an advantage over claimants in that it is too costly to litigate in the event a carrier refuses to voluntarily pay a lawful claim. In many cases, the expense of litigation exceeds the amount of the claim.

Accordingly, small property claims should be subjected to the same dispute settlement programs as Congress provided for household goods shippers. Although it may appear at first blush that property shippers are more sophisticated than household goods shippers, the Council's experiences during the past eight years indicates that there are more shippers unsophisticated in claims and carrier liability issues than those who are knowledgeable in these subjects.

Existing arbitration systems are not completely satisfactory because they are voluntary. The I.C.C. recommended enactment of this legislation in its Report to Congress in *Ex Parte 403,* page 55.

The committee is urged to adopt legislation which would extend the provisions to Sec. 11711 to property claims against motor carriers, as set forth in Appendix G, creating a new Sec. 11712. An additional benefit of this proposal is that carriers would be induced to pay lawful claims or submit to arbitration, or be subject to the payment of claimant's attorney's fees if the claimant were successful.

The Committee is also urged to extend the application of this Section to railroads and freight forwarders at the same time.

In conclusion, we wish to thank the Committee for its consideration of these liability issues and urge its early and favorable actions on the proposals submitted on behalf of the shipping public.

INTERSTATE COMMERE ACT—PART 1—SECTION 20

LIABILITY OF INITIAL AND DELIVERING CARRIER FOR LOSS; LIMITATION OF LIABILITY; NOTICE AND FILING OF CLAIM

(11) Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void: *Provided,* That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water: *Provided, however,* That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary livestock, received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of this title; and any tariff schedule which may be filed with the commission pursuant to such order shall contain specific reference thereto and may establish rates varying with value so declared and agreed upon; and the commission is empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term "ordinary livestock" shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly

valuable for breeding, racing, show purposes, or other special uses: *Provided further,* That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further,* That all actions brought under and by virtue of this paragraph against the delivering carrier shall be brought, and may be maintained, if in a district court of the United States, only in a district, and if in a State court, only in a State through or into which the defendant carrier operates a line or railroad: *Provided further,* That it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulation or otherwise a shorter period for the filing or claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice: *And provided further,* That for the purposes of this paragraph and of paragraph (12) of the section the delivering carrier shall be construed to be the carrier performing the line-haul service nearest to the point of destination and not a carrier performing merely a switching service at the point of destination: *And provided further,* That the liability imposed by this paragraph shall also apply in the case of property reconsigned or diverted in accordance with the applicable tariffs filed as in the chapter provided.

RECOVERY BY INITIAL OR DELIVERING CARRIER FROM CONNECTING CARRIER

(12) The common carrier, railroad, or transportation company issuing such receipt or bill of lading, or delivering such property so received and transported, shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage or injury shall have been sustained, the amount of such loss damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof, and the amount of any expense reasonably incurred by it in defending any action at law brought by the owners of such property. Feb. 4, 1887, c. 104, Pt. I, § 20, 24 Stat. 386; Under 29, 1906, c. 3591, § 7, 34 Stat. 593; Feb. 25, 1909, c. 193, 35 Stat. 649; June 18, 1910, c. 309, § 14, 36 Stat. 555; Mar. 4, 1915, c. 176, § 1, 38 Stat. 1196; Aug. 9, 1916, c. 301, 39 Stat. 441; Feb. 28, 1920, c. 91, §§ 434-438, 41 Stat. 493, 494; July 3, 1926, c. 761, 44 Stat. 835; Mar. 4, 1927, c. 510, § 3, 44 Stat. 1448; Apr. 23, 1930, c. 208, 46 Stat. 251; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § 13, 54 Stat. 916; June 3, 1948, c. 386, 62 Stat. 295; Aug. 2, 1949, c. 379, §§ 7-9, 63 Stat. 486.

RATES, TARIFFS, VALUATIONS

§ 10730. RATES AND LIABILITY BASED ON VALUE

The Interstate Commerce Commission may require or authorize a carrier providing transportation or service subject to its jurisdiction under subchapter I, II, or IV of chapter 105 of this title, to establish rates for transportation of property under which the liability of the carrier for that property is limited to a value established by written declaration of the shipper, or by a written agreement, when that value would be reasonable under the circumstances surrounding the transportation. A rate may be made applicable under this section to livestock only if the livestock is valuable chiefly for breeding, racing, show purposes, or other special uses. A tariff filed with the Commission under subchapter IV of this chapter shall refer specifically to the action of the Commission under this section.

Pub. L. 95-473, Oct. 17, 1978, 92 Stat. 1389.

§ 11707. LIABILITY OF COMMON CARRIERS UNDER RECEIPTS AND BILLS OF LADING

(a)(1) A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under subchapter I, II, or IV of chapter 105 of this title shall issue a receipt or bill of lading for property it receives for transportation under this subtitle. That carrier and any other common carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the Commission under subchapter I, II, or IV are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property caused by (1) the receiving carrier, (2) the delivering carrier, or (3) another carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading and applies to property reconsigned or diverted under a tariff filed under subchapter IV of chapter 107 of this title. Failure to issue a receipt or bill of lading does not affect the liability of a carrier. A delivering carrier is deemed to be the carrier performing the line-haul transportation nearest the destination but does not include a carrier providing only a switching service at the destination.

(2) A freight forwarder is both the receiving and delivering carrier. When a freight forwarder provides service subject to this subtitle and uses a motor common carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title to receive property from a consignor, the motor common carrier may execute the bill of lading or shipping receipt for the freight forwarder with its consent. With the consent of the freight forwarder, a motor common carrier may deliver property for a freight forwarder on the freight forwarder's bill of lading, freight bill, or shipping receipt to the consignee named in it, and receipt for the property may be made on the freight forwarder's delivery receipt.

(b) The carrier issuing the receipt or bill of lading under subsection (a) of this section or delivering the property for which the receipt or bill of lading was issued is entitled to recover from the carrier over whose line or route the loss or injury occurred the amount required to be paid to the owners of the property, as evidenced by a receipt, judgment, or transcript, and the amount of its expenses reasonably incurred in defending a civil action brought by that person.

(c)(1) A common carrier may not limit or be exempt from liability imposed under subsection (a) of this section except as provided in this subsection. A limitation of liability or of the amount of recovery or representation or agreement in a receipt, bill of lading, contract, rule, or tariff filed with the Commission in violation of this section is void.

(2) If loss or injury to property occurs while it is in the custody of a water carrier, the liability of that carrier is determined by its bill of lading and the law applicable to water transportation. The liability of the initial or delivering carrier is the same as the liability of the water carrier.

(3) A common carrier of passengers may limit its liability under its passenger rate for loss or injury of baggage carried on passenger trains, boats, or motor vehicles, or on trains, or boats, or motor vehicles carrying passengers.

(4) A common carrier may limit its liability for loss or injury of property transported under section 10730 of this title.

(d) A civil action under this section may be brought against a delivering carrier in a district court of the United States or in a State court. Trial, if the action is brought in a district court of the United States is in a judicial district, and if in a State court, is in a State, through which the defendant carrier operates a railroad or route.

(e) A carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section. The period for bringing a civil action is computed from the date that person receives written notice from the carrier that it has disallowed any part of the claim specified in the notice.

Pub. L. 95-473, Oct. 17, 1978, 92 Stat. 1453.

PUBLIC LAW 96-296—JULY 1, 1980

RATES AND LIABILITY BASED ON VALUE

SEC. 12. Section 10730 of title 49, United States Code, is amended by inserting "(a)" before "The Interstate Commerce Commission", by inserting "(including a motor common carrier of household goods but excluding any other motor common carrier of property)" after "authorize a carrier", and by adding at the end thereof the following new subsection:

"(b)(1) Subject to the provisions of paragraph (2) of this subsection, a motor common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title may, subject to the provisions of this chapter (including the general tariff requirements of section 10762 of this title), establish rates for the transportation of property (other than household goods) under which the liability of the carrier for such property is limited to a value established by written declaration of the shipper or by written agreement between the carrier and shipper if that value would be reasonable under the circumstances surrounding the transportation.

"(2) Before a carrier may establish a rate for any service under paragraph (1) of this subsection, the Commission may require such carrier to have in effect and keep in effect, during any period such rate is in effect under such paragraph, a rate for such service which does not limit the liability of the carrier.".

APPENDIX C-2

PUBLIC LAW 96-448—OCT. 14, 1980

PERMISSIVE LIMITED LIABILITY RATES

SEC. 211. (a) Section 10730(a) of title 49, United States Code, is amended by inserting "and excluding any rail carrier" immediately after "motor common carrier of property".

(b) Section 10730 of title 49, United States Code, is amended by adding at the end thereof the following new subsection:

"(c) A rail carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title may establish rates for transportation of property under which the liability of the carrier for such property is limited to a value established by written declaration of the shipper or by a written agreement between the shipper and the carrier, and may provide in such written declaration or agreement for specified amounts to be deducted from any claim against the carrier for loss or damage to the property or for delay in the transportation of such property.".

APPENDIX D

TRANSPORTATION ASSOCIATION OF AMERICA,
TRANSPORTATION'S PREEMINENT, AUTHORITATIVE VOICE IN WASHINGTON,
Washington, D.C., April 28, 1982.

Hon. JAMES J. HOWARD,
Chairman, House Committee on Public Works and Transportation, 2165 Rayburn House Office Building, Washington, D.C.

DEAR CHAIRMAN HOWARD: This letter has reference to a recent discussion in Mr. D'Amico's office on February 22, 1982, attended by both shipper and trucker representatives concerning collectively made motor carrier rates and classifications predicated on released values, and the desirability of maintaining this concept of carrier pricing and commodity classification. Both shippers and carriers want collective released ratemaking to continue.

From the carrier's point of view, released rates provide a means by which its liability for the property being transported is limited to a value established by written declaration of the shipper. In exchanging for this limitation of liability, the shipper is able to avail himself of lower transportation charges than would otherwise be applicable.

During the February 22 discussion, the question arose on the dollar savings resulting from released ratemaking. Based on an extrapolation of data obtained from the files of the American Trucking Associations, it has been determined that, from classification-related traffic alone, shippers realized a savings in excess of $44 million in the calendar year 1980 through use of released value.

We have no specific information currently at hand with respect to the amount this saving would be increased by the inclusion of the released value provisions applicable to commodity rates; however, it is accurate to say that it would be quite substantial. Thus, in the final analysis, we are talking about an annual savings to the shipping public, as a result of these collectively made released rates and ratings, of $50 million at a minimum, and perhaps as much as $75 million to $100 million. The savings on class-rated traffic alone amount to 35 percent of the full-value rate costs.

Aside from cost benefits, another positive factor of released value provisions is that they are typically established for commodities that exhibit a wide range in value, are susecptible to lose or damage, have a high ratio of claims to freight charges, and have a great number or frequency of claims for loss and damage. Consequently, because of these rather "extraordinary" charateristics, released value provisions often provide the only alternative to facilitiate the use of rates that are not so high as to virtually prohibit the movement of the affected products via motor common carriers and, at the same time, protect the carrier against high liability risk and catastrophic loss.

Despite these benefits to both shippers and carriers that flow from collectively made released rates and classifications, they are prohibited by the Motor Carrier Act of 1980. The Act also provides that prior to January 1, 1984, the only collective actions authorized in connection with released value provisions are changes in those provisions which were established prior to enactment of the Act. No new released rates my be established under the collective process. The unfortunate onsequence of those prohibitions and limitations is that they deprive shippers and carriers of the opportunity for improvement in an area that both agree is of considerable mutual benefit, with ultimate benefits flowing to the consumers of America.

Instead of encouraging the negotiation of new released rates by shippers and their individual carriers, the removal of antitrust immunity has brought such negotiations to a virtual standstill. For example, the Middle Atlantic Conference has recovered only two "independent action" rate fillings involving newly negotiated released rates since July 1, 1980. One involved "Freight All Kinds" (FAK) rates on small shipments and the other involved clothing. The Shippers National Freight Claim Council has not received a single report from any of its members that any new released rates have been negotiated since July 1, 1980.

Accordingly, motor carriers and shippers whose products currently move subject to released valuations are convinced that the establishment and maintenance of released rates and classifications exclusively on a carrier-by-carrier basis, as authorized by the Motor Carrier Act, rather than through the collective process, is totally inadequate and unresponsive to the public interest. These carriers and shippers share the view that modification of the Motor Carrier Act of 1980 to reinstate authorization for collective action in connection with released rates and classification would be consistent with the legislative goals of the Act, and should be given favorable consideration by Congress this year.

Thank you for the opportunity to present these comments on this important issue. We have already presented your staff with suggested legislative language to accomplish the desired improvement. We hope that you will agree to support and process such legislation this year. If you have any questions or need any further information, please let us know.

Sincerely,

BENNETT C. WHITLOCK, Jr.,
President, American Trucking Association.
JAMES G. HARKINS,
Executive Director, National Motor Freight Traffic Association.
JOSEPH F. H. CUTRONA,
Executive Director, National Small Shipments Traffic Conference.
ROBERT HENRI BINDER,
President, Transportation Association of America.
ROBERT J. BONCHARD,
President, Shippers National Freight Claim Council.
DANIEL J. SWEENEY,
Counsel, Drug & Toilet Prep. Traffic Conference.

APPENDIX E

THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE,
Washington, D.C., May 6, 1982.

Hon. JAMES J. HOWARD,
Chairman, Committee on Public Works and Transportation, U.S. House of Representatives, Washington, D.C.

DEAR CHAIRMAN HOWARD: The National Industrial Traffic League would like to take this opportunity to express its views on the current situation surrounding the development and use of released value rates and classifications in the trucking industry.

As you are aware, the League, along with other shipper and carrier interests, on February 22 met with Sal D'Amico of your staff to discuss our experiences with released value rates since passage and enactment of the Motor Carrier Act of 1980.

The League strongly supported passage of this legislation. In the almost two years since its enactment, shippers and receivers have benefited greatly from the pro-competitive emphasis of this law.

While the impact of the Motor Carrier Act has been generally favorable, one provision has had a considerable adverse impact on the availability of released value rates. This provision, Section 10706(b)(3)(C), removed antitrust protection from the collective consideration and making of released rates. This section was intended to foster greater individual shipper-carrier negotiations on released rates. However, experience has shown that negotiations of new released rates and classifications on a one-to-one basis, since July 1, 1980, have been virtually nil.

Released value rates and classifications are of particular importance to shippers, since often it is the only way to secure competitive rates on traffic that is susceptible to damage or theft. They also benefit carriers, since they indemnify against high insurance liability and catastrophic loss.

This apparent impediment to the growth of released value rates new law stems from the administrative and other burdens facing a shipper whose firm may transport a whole range of commodities utilizing any number of motor carriers. While shippers value the price and service alternatives available to them through the use of released rates, most, if not all shippers and receivers have the time nor resources to negotiate such rates on a carrier-by-carrier basis.

The League believes the availability of released values rates is consistent with the pro-competitive aspects of the Motor Carrier Act. However, experience has demonstrated that the present law requiring that such rates be arrived at on an individual shipper-carrier basis is inadequate and unresponsive to the public interest.

To ameliorate this problem and to ensure that shippers and receivers have the full range of price and service options contemplated by the Congress in the passage of the Motor Carrier Act of 1980, the League would support efforts to consider whether antitrust immunity for collective carrier action on released value rates and classifications should be restored.

The League looks forward to working with you and your staff to resolve this important problem.

Sincerely,

James E. Bartley,
Executive Vice President.

APPENDIX F

§ 11707. LIABILITY OF COMMON CARRIERS UNDER RECEIPTS AND BILLS OF LADING. 49 USC 11707

* * * * * * *

(e) A carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section. The period for bringing a civil action is computed from the date that person receives written notice from the carrier that it has disallowed any part of the claim specified in the notice.

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* * * * * * *

Subsection (b) amends section 11707(e) of title 49 to clarify when claims have been disallowed. Under the statute, the period for bringing a civil action against a carrier for a claim is computed from the time a person receives written notice from the carrier that the claim has been disallowed. Subsection (b) provides that for purposes of section 11707(e), an offer of compromise will not constitute such a disallowance unless the carrier specifically informs the claimant in writing that its claim is disallowed as filed, and provides reasons for such disallowance. Further, any communications received from a carrier's insurer will not constitute a disallowance, unless the insurer, in writing, informs the claimant of the disallowance and informs the claimant that the insurer is acting on behalf of the carrier. Except where otherwise provided in the Motor Carrier Act of 1980, the Committee expects that the Commission will retain and enforce existing regulations as to the processing of loss, damage, and overcharge claims in order to protect the public interest. This is consistent with the Committee's intent that this legislation not weaken the interest and protection of shippers.

APPENDIX G

§ 11707. LIABILITY OF COMMON CARRIERS UNDER RECEIPTS AND BILLS OF LADING

* * * * * * *

(e) A carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section. The period for bringing a civil action is computed from the date the carrier gives a person written notice that the carrier has disallowed any part of the claim specified in the notice. For the purposes of this subsection—

(1) an offer of compromise shall not constitute a disallowance of any part of the claim unless the carrier, in writing, informs the claimant that such part of the claim is disallowed and provides reasons for such disallowance; and

(2) communications received from a carrier's insurer shall not constitute a disallowance of any part of the claim unless the insurer, in writing, informs the claimant that such part of the claim is disallowed, provides reasons for such disallowance, and informs the claimant that the insurer is acting on behalf of the carrier.

APPENDIX H

CARGO DISPUTE SETTLEMENT

Chapter 117 of title 49, United States Code, is amended by inserting after section 11711 the following new section:

"Section 11712 Dispute settlement program for common carriers

"(a)(1) One or more common carriers providing transportation of property (other than household goods [1]) subject to the jurisdiction of the Commission under subchapters I, II and IV of chapter 105 of this title who want to establish a program to settle disputes between such carriers and shippers concerning the transportation of such property may submit an application for establishing such program to the Commission. Such application shall be in such form and contain such information as the Commission may, by regulation, require. The Commission shall review and approve, in accordance with the provisions of this section, each application submitted under this subsection.

"(2) The Commission shall approve at least within 45 days of its filing, any application to establish a program for settling disputes concerning the transportation of property which meets the requirements of subsection (b) of this section.

"(3) The Commission may investigate at any time the functioning of any program approved under this section and, after notice and an opportunity for a hearing, may suspend or revoke its approval for failure to meet the requirements of this section and such regulations as the Commission may issue to carry out the provisions of this section.

"(4) This dispute settlement program shall not apply to shipments of property the value of which exceeds $5,000 per shipment.

"(b) No program for settling disputes concerning the transportation of property may be approved under this section unless the program is a fair and expeditious method for settling such disputes and complies with each of the following requirements and such regulations as the Commission may issue:

"(1) The program is designed to prevent a carrier from having any special advantage in any case in which the claimant resides or does business at a place distant from the carrier's principal or other place of business.

"(2) The program provides for adequate notice of the availability of such program, including a concise easy-to-read, accurate summary of the program and disclosure of the legal effects of election to utilize the program. Such notice must be given to persons for whom such property is to be transported by the carrier before such property is tendered to the carrier for transportation.

"(3) Upon request of a shipper, the carrier must promptly provide such forms and other information as are necessary for initiating an action under the program to resolve a dispute.

"(4) Each person, authorized pursuant to the program to arbitrate or otherwise settle disputes, must be independent of the parties to the dispute and must be capable, as determined under such regulations as the Commission may issue, to resolve such disputes fairly and expeditiously. The program must ensure that each person chosen to settle the disputes is authorized and able to obtain from the shipper or carrier any material and relevant information to the extent necessary to carry out a fair and expeditious decision-making process.

"(5) The program must not require the shipper to agree to utilize the dispute settlement program prior to the time that a dispute arises.

"(6) The program may provide for an oral presentation of a dispute concerning transportation of property by a party to the dispute (or a party's representative), but such oral presentation may be made only if all parties to the dispute expressly agree to such presentation and the date, time, and location of such presentation.

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[1] As described in 49 U.S.C. 10102(10)(A), but including all other household goods movements not encompassed in 49 U.S.C. 11711.

"(7) Any person settleing a dispute concerning transportation of property under the program must, as expeditiously as possible but at least within 60 days of receipt of written notification of the dispute, render a decision based on the information gathered, except that, in any case in which a party to the dispute fails to provide in a timely manner any information concerning such dispute which the person settling the dispute may reasonably require to resolve the dispute, the dispute settler may extend such 60-day period for a reasonable period of time. A decision resolving a dispute may include any remedies appropriate under the circumstances, including repair, replacement, refund, reimbursement for expenses, and compensation for damages.

"(c) Materials and information obtained in the course of a decision-making process to settle a dispute under a dispute settlement program approved under this section may not be used to bring an action under section 11910 of this title.

"(d) In any court action to resolve a dispute between a shipper of property and a common carrier providing transportation subject to the jurisdiction of the Commission under subchapters I, II and IV of chapter 105 of this title concerning the transportation of property (other than household goods) by such carrier, the shipper shall be awarded reasonable attorney's fees if—

"(1) the shipper submits a claim to the carrier within 9 months after the date the shipment is delivered or in the event of non-delivery, within 9 months plus a reasonable time for delivery, whichever is later;

"(2) the shipper prevails in such court action; and

"(3) no dispute settlement program approved under this section was available for use by the shipper to resolve the dispute.

"(e) In any court action to resolve a dispute between a shipper of property and a common carrier providing transportation subject to the jurisdiction of the Commission under subchapters I, II and IV of chapter 105 of this title concerning the transportation of property (other than household goods) by such carrier, such carrier may be awarded reasonable attorney's fees by the court only if the shipper brought such action in bad faith.

MAY 20, 1982.

Senator LAWTON M. CHILES,
Room 437, Russell Senate Office Building,
Washington, D.C.

DEAR SENATOR: After being married to a truck driver for almost 31 years, I finally decided to make a trip with my husband who is an independent trucker. I had no idea of the harassment and persecution these hard working people contend with in their attempt to earn a living.

The single most serious problem appears to be the log book, which is based on a law passed in 1955, or so I understand. What other group of working people have to account for every hour they work and sleep. In addition, they cannot work more than 70 hours in ten days. As a registered nurse on rotating days off, I must work 9 days in order to have a long week-end off. If for some reasons we become short-staffed, I might be asked to work a double shift (16 hours). There would be no consideration of how many days I had worked or how much sleep I had had although I would be responsible for the medication, treatment and even the lives of sick people.

On the trip I took with my husband there were three safety inspections in the state of Arizona alone. I might note that these inspections were only for independent trucks. Company trucks are not included in these inspections. It is claimed that they are inspected at their terminals. My husband worked as a dispatcher for a company in Detroit for a while and says that when an inspection was done at that company, any truck that would not pass was indicated as out of service and after the inspection were put back in service. These safety inspections mean a wait of up to one to three hours in a line of trucks with a perishable load and a delivery deadline. I'm sure you don't have to be a truck driver to see the problem created—don't drive over 55 MPH and don't drive over 70 hours in 10 days. I just talked to my husband on the telephone—this trip it's a log book check three times in the state of Texas. He had to take 8 hours extra off to make his log book legal.

In addition, a truck has to have a permit for each state it enters. When the driver enters a state he must purchase fuel in that state or pay additional fuel and road tax based on the number of miles driven in that state. Sometimes it's cheaper to pay the tax than buy the fuel.

Somehow people have gotten the idea that the independent trucker is making a bundle of money. In fact the opposite is true. Below are the figures for my husband's truck for the first three months of this year:

Gross income	$32.256.10
Broker fees	6,815.14
Fuel taxes	250.10
Maintenance and repairs	1,586.06
Fuel and oil	11,578.49
Tolls and scales	48.60
Truck insurance	961.98
(Trailer insurance due June 2)	679.00
Rooms and meals en route	2,007.61
Truck payments	6,013.83
Trailer payments	1,591.20
Total net income	1,403.09
Monthly average	467.70

The Ser. Charge did help some although it had little effect on my husband's business because it did not apply to produce loads. Of course, immediately after this Ser Charge was reduced on May 4, 1982, the cost of fuel went up 4 to 8 cents per gallon all across the country.

We are all aware that the country is in a period of inflation and recession, but something could certainly be done about the inane log book law and excessive inspections. Scales and checks on entering and leaving each state certainly ought to be adequate control.

My husband and I and all independent truckers would certainly appreciate any attention you could give to the situation as it now stands.

Sincerely,

Mrs. Richard Hoffrichter.

Independent Truckers Association of C.S.R.A.,
Saluda, S.C., September 17, 1982.

Senator Ernest F. Hollings,
Dirksen Office Building, Washington, D.C.

Subject: Truckers need a mandatory written contract of haul.

Dear Senator Hollings: The Motor Carrier Act of 1980 called for mandatory written contracts of haul "where appropriate." Recently, the Interstate Commerce Commission forwarded to Congress a study which said such contracts were not needed. This simply is not true. As it stands, truckers have no alternative in a claims dispute other than the civil courts, which are costly and time consuming.

Mandatory written contracts would alleviate many of the problems that now exist because responsibilities of the various parties would be spelled out. We have seen proof that ICC Chairman Reese Taylor Jr. predetermined how he would vote on the contract of haul before he had all the facts. What's more, the USDA once supported mandatory contracts but reversed its position when political pressures became too great.

Truckers continue to be abused when a disagreement arises concerning a shipment, particularly in exempt transportation. This situation is unfair and only contributes to the demise of the independent trucker.

I strongly urge the United States Congress to do what the ICC and USDA were afraid to do. That is, take a fair and impartial look at the mandatory contract of haul issue. If this is done, I am confident that Congress will present and enact legislation that will allow the independent to be placed on equal footing with the shippers in claim disputes.

Truckers simply seek a mandatory contract that makes clear the basic responsibilities of the transportation agreement.

Thank you in advance for your time and consideration in this matter. I look forward to your response.

Sincerely,

William A. Robinson,
President.

GEORGIA FREIGHT BUREAU, INC.,
Atlanta, Ga., December 13, 1982.

Senator ROBERT PACKWOOD,
Senate Commerce Committee, U.S. Senate, Washington, D.C.

DEAR SENATOR PACKWOOD: The Georgia Freight Bureau will not be able to be in Washington December 14 to present its views at your oversight hearing on the Motor Carrier Act of 1980.

You will find enclosed an article we wrote for the December 6 issue of Traffic World expressing our views on the Motor Carrier Act.

Please enter these views of the Georgia Freight Bureau in the public record.

Cordially,

NAT WELCH,
Executive Vice President.

Enclosure.

SOUTHEAST SHIPPERS' REACTIONS TO 1980 CARRIER DEREGULATION LAWS DISCUSSED

Much has been written about the opinions of motor carriers and railroads about deregulation, but little about what shippers and receivers of freight—the people who pay the bills—think about it.

The Georgia Freight Bureau serves 435 southeastern shippers and receivers and has its hand on the pulse of shipper reaction to deregulation.

The freight transportation industry is the oldest regulated sector of the American economy. This dates from the passage of the Interstate Commerce Act of 1887. The industry received a jolt when Congress two years ago passed the Staggers Rail Act and the Motor Carrier Act of 1980, the two most important transportation laws passed by Congress in a single year in this country. This legislation partially deregulated both the motor carrier and the rail industries.

What has been the effect? From the shippers' viewpoint, there have been pluses and minuses.

Shipper benefits from the Motor Carrier Act of 1980 stem largely from one word—competition. The Motor Carrier Act of 1935 established very tight entry requirements, franchising specific routes to carriers. Consequently, truckers completed in service but not on rates. In fact, the Interstate Commerce Commission prohibited discussion of lower rates in entry cases.

Rate competition and ease of entry are two hallmarks of the Motor Carrier Act of 1980. Eighteen months ago, some truckers in the Southern Motor Carriers Rate Conference began offering 10-per-cent discounts off class rates for freight moving in single line service. Recently, one carrier offered a sizable 26 per cent off class rates between Atlanta-Birmingham and Atlanta-Memphis. Other discounts are offered for multiple pickups and for delivery to a carrier's dock. Discounts have been a big benefit to shippers!

Congress had concerns about antitrust immunity granted motor carriers to meet in rate bureaus to establish rates collectively and consequently established the Motor Carrier Rate Making Study Commission to report to Congress next year on the future of rate bureaus. The Georgia Freight Bureau filed testimony with the Motor Carrier Rate Study Commission supporting the continuating of rate bureaus.

"Collective ratemaking under the Motor Carrier Act of 1980," the Georgian Bureau said, "has not inhibited competitive pricing, which has actually accelerated under current conditions. One need only look at the plethora of rate discount plans to find that this is true. This explosion of price reductions has occurred through rate bureaus under the existing collective ratemaking process."

Shippers have also benefited from the relaxation of entry controls, Prior to 1980, motor carrier operating rights were very valuable commodities with one carrier paying big money for the rights of another. This practice reached its ridiculous extreme when the operating rights of a bankrupt carrier, Associated Transport, sold for $21 million five years ago . . . a grossly unfair burden to be paid for by the shippers and ultimately the public. The Motor Carrier Act of 1980 substantially opened up entry which multiplied competition and reduced the value of operating rights to zero. Many carriers aggressively expanded their scope of operations opening new terminals and going for the heavy freight corridors. This meant two big benefits for shippers: (1) More competitive options and (2) freight could move on long hauls over one carrier instead on two or three—hence a more efficient freight system.

During the congressional hearings leading up to the Motor Carrier Act of 1980, motor carriers put great emphasis on their obligation to serve small communities as part of their responsibility under the ICC franchise system. Congress was very concerned about the small town service issue and will conduct oversight hearings to monitor this area. The Georgia Freight Bureau has had no complaints from members on small town service so far. With the recession, traffic is down and carriers are scrambling for business, even the small town sector. We will have to wait until business picks up substantially to evaluate this issue.

The recession and dergulation have hit the motor carriers very hard. Four out of five general-commodity motor carriers lost money the first quarter of 1982. The figures were slightly better in the South where the Southern Motor Carriers Rate Conference, which tracks statistics on 81 southern "frame" carriers, reported that 42 to 50 per cent of SMCRC carriers lost money the first six months this year. In some cases the losses have forced the shut-down of national and regional carriers. Barnes Freight Line of Carrollton, GA., a primary Georgia intrastate feeded carrier since 1930, closes its doors in June.

The common carriers have lost a sizable portion of their freight, especially truckloads, to private, contract, irregular route carriers and to rail piggyback. The common carrier system is a national asset in the U.S. How much more freight erosion from commom carriers can take place without irreparably harming our common carrier system is a serious question the nation must fact up to.

While shippers have fared well under the Motor Carrier Act of 1980, benefits have been severely restricted under the Staggers Rail Act. The prime purpose of that act was to remove the heavy hand of regulation from the backs of the railroads so they could compete. Congress was tired of financing bankrupt railroads like Conrail. Conrail management aggressively used the pricing freedoms of the Staggers Act. This was an important reason for Conrail making a profit in 1981, its first in seven years.

The biggest benefit to shippers under the Staggers act has been much lower rates on piggyback traffic. In March, 1981, the ICC completely deregulated piggyback rates. Using this price flexibility, the railroad aggressively went after highway truckload traffic especially on the long-haul, heavy traffic corridors like Atlanta to Chicago. In the last 18 months, general rail rates have advanced 13 percent and piggyback rates have deceased a conservative 12 percent—a net saving of 25 percent. A big factor producing lower rates has been the favorable volume contracts shippers agents, freight forwarders, and consolidators have been able to negotiate with railroads. There has been little reduction in piggyback rates on short hauls, like Savannah to Atlanta, simply because the margins are thin.

Big shippers have been able to negotiate contract rates with the railroads under the Staggers Act but this has been of practically no benefit to the small shipper.

The Staggers Act accelerated the merger procedures before the ICC. In late 1980, the Family Lines and the Chessie System were merged, creating a giant north-south rail system, the CSX. The Southern and the Norfolk and Western countered by creating the Norfolk Southern Corporation (NS) which came into being on June 1. The Georgia Freight Bureau is bullish about the long-run benefits of these two big mergers but is anxious to see these railroads move forward with promised benefits such as North-South run-through trains and lower freight rates on grain from the midwest to Georgia poultry and cattle farmers made possible by consolidation economies. NS and CSX need to improve TOFC and COFC service between South Atlantic ports and the mid-South and mid-West.

While practically all sectors of the economy are suffering from the recession, profits are up sharply for Norfolk Southern which earned $269 million the first half of 1982, up 25 per cent from the same period in 1981. CSX's first half earnings were $118 million, down 5.6 per cent from 1981. The recession caught up with these two railroads, who experienced a profit drop in the third quarter.

The biggest drawback shippers have experienced with the Staggers Act is the lack of protection for captive shippers (e.g. coal, grain, pulpwood, lumber, fertilizer and kaolin), who have no viable transportation alternatives, against unreasonable rail rates. Shippers fought hard for protections against railroad monopoly pricing. But Staggers safeguards have proven to be a mirage. The ICC has set such tight guidelines for determining who is a captive shipper, a shipper has yet to prove before the Commission he's captive, a prerequisite in any rate investigation. In the meantime, profits of the Southern carriers continue to be healthy.

The National Industrial Transportation League spells out other shipper complaints with the Staggers Act. These are: (1) Cancellation of joint routes through competitive and economically viable gateways; (2) Failure of the railroads to implement Staggers reforms on reciprocal switching and trackage rights; (3) No provision for downside adjustment in quarterly rate change in times of recession and falling prices; and (4) no pass-through or productivity improvements made by railroads until "we get as healthy as we want do be."

State regulatory bodies, such as the Georgia Public Service Commission, were virtually stripped of all their powers over railroads. The Staggers Act mandated the ICC to take over intrastate rate control . . . another shipper loss.

After the passage of the Staggers Act, the Southern Freight Association discontinued all shipper hearings—an additional loss under the Act. A recent ICC decision has forced the SFA to reinstitute shipper hearings under tight guidelines.

What is the future role of the Interstate Commerce Commission in this modified deregulated environment? Some advocate abolishing the ICC. With the accelerated movement of rail mergers in the last three years, we could well end up with only four or five railroads in the next few years. This results in monopoly power! The Georgia Freight Bureau advocates continuation of the ICC as the "commerce court" of the nation to balance the needs of shippers and the public against that of the railroads. Although the ICC has virtually abandoned the need for proving "public convenience and necessity" in motor carrier entry cases, the Georgia Freight Bureau believes the ICC has an important role to play in making sure that motor carriers are "fit, willing and able" and have the equipment, experience and proper insurance to do the job the ICC certificates each carrier to perform.

How has all this change affected the Georgia Freight Bureau? The bureau, which celebrated its 80th birthday this spring, represents 435 shippers and receivers in Georgia. Two indices of the bureau's effectiveness are new members signed and overcharges collected from railroads and motor carriers. In the last 18 months, the bureau has added 78 new members and has recovered $740,657 in overcharges. Collections for 1981 were 56 per cent over 1980. June, 1982, broke all bureau records with $114,682 collected.

Changes are taking place so rapidly as a result of the partial deregulation of the motor carrier and rail industries, shippers and receivers of freight need a professional organization to turn to—hence the Freight Bureau is busier than ever. The cornerstone is a strong staff of ten professionals with 264 years of transportation experience.

Our present staff includes Traffic Manager Henry Moyers (six years with the bureau and 18 years with motor carriers); Bill Fuller (12 years with the bureau), Vinson Wall (seven years with SMCRC and 10 years with the bureau), Sam Graham (47 years with the Central of Georgia and the Southern Railway and five years with the bureau), John Youngbeck (Union Pacific Railroad and 3 years with the bureau), Laura Howell (37 years with motor carriers and three years with the Bureau), J. W. Dunn (38 years experience with motor carriers), Stew Gibson (45 years with the Norfolk and Southern and the Southern Railway), and Stan Eddy (25 years' experience with motor carriers and the SMCRC).

Another source of strength is a strong board of directors. The bureau was called the Atlanta Freight Bureau from 1902–1976 but changed its name six years ago to the Georgia Freight Bureau. This past year Arthur Gignilliat, president of the Savannah Electric & Power Co., and Frank Dennis, president of the Augusta Iron & Steel Works, were elected to the board for stronger state-wide representation.

Rapid rate and service changes are increasing members' needs for fast, accurate freight rates and technical transportation advice. The largest tariff library in the Southeast gives the bureau staff the capability of quoting rail and truck rates on almost any commodity moving by regular route common carrier nationwide and to and from Canada. To stay abreast of tariff changes, the bureau substantially increased its tariff budget and doubled its tariff filing personnel.

Another of the bureau's keystone services is the representation of shipper members before rate bureaus and regulatory bodies such as the Georgia Public Service Commission and the Interstate Commerce Commission. The bureau saves Georgia shippers millions of dollars each year in contested cases on rates. Following the bureau's protest, the Southern Motor Carrier Rate Conference cut back by $55,440,000 its April, 1981, rate increase.

MacFarlane & Co., management consultants, recently completed a three- to five-year strategic plan for the bureau. MacFarlane surveyed members by mail and conducted 99 personal interviews with members, carriers, organizations, and government executives. They recommended that the bureau continue its present successful course, provide services in import/export and small package transportation and pursue adding a small computer for rate statements and office administration.

The Airline Deregulation Act was passed by Congress in 1978. On his retirement as vice-chairman of Delta Airlines, Richard Maurer recently observed that the airline industry will probably have to go through two complete business cycles before an accurate appraisal can be made of airline deregulation.

The Georgia Freight Bureau believes that this is probably true of the freight business.

TURNEY & TURNEY,
Washington, D.C., December 16, 1982.

Hon. JOHN C. DANFORTH,
Chairman, Subcommittee on Surface Transportation, Committee on Commerce, Science, and Transportation, United States Senate, Washington, D.C.

DEAR SENATOR DANFORTH: Mr. Reese Taylor, Chairman of the Interstate Commerce Commission, testified December 14, 1982 during oversight hearings before the Surface Transportation Subcommittee. His statement regarding a decline in the number of consumer complaints the ICC has received prompted a number of questions and comments from the Subcommittee members. The Motor Carrier Lawyers Association believes Mr. Taylor's remarks merit careful examination in light of certain facts not brought out during his testimony. As Chairman of MCLA's Legislative Committee, I would like to highlight the extenuating circumstances not mentioned.

As discussed on page 12 of MCLA's enclosed written statement, the decline in the number of consumer complaints about motor carrier service is attributable, at least in part, to two obvious factors the ICC chooses to ignore: it has closed off a major avenue of communications with the public, terminating its 800-number "Hot Line" service in 1981; and it now discourages consumer complaints by refusing to investigate and resolve the vast majority of those it does receive.

There are two additional reasons for this decline. First, according to ICC statistics, a large number (if not most) of the consumer complaints about motor carrier service had been directed at household goods carriers. Congress, itself, has had a hand in dramatically reducing these complaints. The Household Goods Transportation Act of 1980 and the ICC's subsequent regulations adopted in 1981 and 1982 to implement that Act impose stricter obligations on household goods carriers in dealing with the public and ended many motor carrier practices that had led to consumer abuses. The Act also puts in place voluntary dispute settlement programs that obviate ICC involvement in handling consumer/carrier conflicts. Second, the economic conditions of the country during the past 18 months have left the motor carrier industry with far less traffic to handle; reduced service produces fewer complaints.

The raw figures to which Mr. Taylor alludes in his testimony may show a decline in the overall number of consumer complaints about motor carrier service generally for the reasons explained above. At the same time, we have reason to believe the number of complaints about the service of non-household goods motor carriers of property remains very high. The ICC itself reports that recent complaints of this nature have gotten so out of hand they have virtually swamped one of its Regional Offices where the brunt of the consumer complaints are now lodged. This phenomena is graphically demonstrated by an article entitled "A Field Day!" appearing in the November 1982 issue of *Insights*, the Commission's internal communications publication. A copy of this issue is attached for your information. See particularly page 7.

MCLA urges the Surface Transportation Subcommittee not to accept the ICC's citation to declining complaint figures at face value. Given careful scrutiny, they will not, we submit, substantiate greater public satisfaction with the workings of the Motor Carrier Act of 1980.

Sincerely,

KIM D. MANN,
Chairman, Legislative Committee.

Enclosure.

STATEMENT OF JOHN S. FESSENDEN, PRESIDENT, MOTOR CARRIER LAWYERS ASSOCIATION

The Motor Carrier Lawyers Association (MCLA) welcomes this opportunity to address the Senate Commerce Committee in its continuing oversight of the Motor Carrier Act of 1980. At the time of last year's oversight hearing, we submitted written testimony in which we cited severe shortcomings in the ICC's administration of the new Act. We regret to say that the situation at the ICC has not improved in the year that has passed.

Our Association is made up of several hundred lawyers who practice before the Interstate Commerce Commission, other government agencies, and state and federal courts, representing motor carriers, as well as shippers and receivers of freight. The nature of our practice makes it mandatory for us to keep up to date on legislative developments and, just as importantly, on the way in which the ICC is administering, or failing to administer, the law. Our clients must be advised how best to proceed in these difficult times of recession and deregulation.

The point we wish to make to this Committee is that in several critical areas the ICC has gone far beyond the Congressional mandate of the Motor Carrier Act of 1980 and has opted for virtually total deregulation, an option Congress considered and rejected when it passed the Act. We urge the Committee to remind the ICC that, although the purpose of the Act is to ease entry and to place greater emphasis on competition, it is not intended as a signal to the ICC to surrender its regulatory responsibilities in reliance upon economic theories the ICC styles as "marketplace forces."

The need for the ICC to restrain further deregulatory efforts and to function in strict compliance with the law and with the intent of Congress is particularly important now when the economic picture in the trucking industry is so bleak. Every day, motor carriers are closing their doors or severely curtailing service. In particular, many carriers have been forced to abandon their transportation of smaller shipments—less-then-truckload freight—an action which penalizes small shippers and forces trucking employees out of work. A list of some motor carriers which have entered bankruptcy or have abandoned or sharply curtailed service since passage of the 1980 Act will, we understand, be attached to the prepared Statement of Bennett Whitlock, President of the American Trucking Associations. A list of additional motor carriers that, as of the date of the compilation of the corresponding ATA list, June 23, 1982, fall within one of these categories in attached to this statement. At this critical juncture the ICC should be administering the Act in a manner which fulfills the requirements of the national transportation policy, including "the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States . . ." The ICC's reliance on competition alone and for its own sake is an abondoment of its responsibility under the Act.

In advising carrier and shipper clients, lawyers are guided by the Act and its legislative history. In many instances, the Act says one thing, while the ICC's pronouncements and apparent policies point toward a different conclusion. The client must ponder this disparity and must decide whether to follow ICC policy and thus risk violating the Act. There should be no such conflict. The ICC should stick to the law as it was written and leave policy making to Congress. Our sentiments were expressed succinctly by Chairman Taylor of the ICC in a position paper he issued in August, 1981: . . . the Commission has strayed from the Congressional intent of the Motor Carrier Act of 1980. In its effort to implement quickly the provisions of the new legislation, the Commission embarked on a course which would ultimately lead to total deregulation contrary to the express prohibition of Congress.[1]

The conflict between the Act and the ICC's interpretation of it is both real and serious. It presents to attorneys attempting to give clients sound legal and practical advice an impossible dilemma and places clients in a worse situation, if that is possible. Where the ICC grants at least tacit approval to an action which appears contrary to the express language of the law, and where a carrier is under stong competitive pressure to take the action, the conflict is clear. No lawyer ethically may advise the client to violate the law, yet the lawyer is faced with advising the client of the practical reality: since the ICC is the primary interpretive authority, the violation will not be so characterized by the ICC. Obviously, a rational regulatory system should not leave the attorney and his client confronted with the problem of a government agency refusing to adhere to the provisions of the statute which it has the duty to administer.

Our written testimony before this Committee a year ago describes the ICC's sweeping efforts to effect unlimited entry into the motor carrier field and its refusal to consider whether potential entrants were fit to serve the public and threatened the stability of the motor carrier industry. Today we must report that things are no better. We would like to focus on three areas in which the ICC has failed to adhere to Congressional policy—areas we believe require this Committee's attention.

The first area concerns the duty of a motor common carrier to serve on a common basis all members of the public it is authorized to serve, a duty that is not fulfilled if a common carrier—with the ICC's blessing—may pick and chose among shippers and receivers. The testimony of the ATA and the Teamsters before this Committee will touch upon this critical area. Significantly, the testimony of the ICC and other federal agencies will, we believe, avoid it.

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[1] Position Paper of Chairman Reese H. Taylor, Jr., Regarding Implementation of the Motor Carrier Act of 1980, at 10.

The second area concerns the requirement that a motor common carrier be fit, willing, and able to provide the service it proposes. Today, the ICC makes no meaningful effort to determine if the carriers to which it so liberally grants broad, unrestricted authority will act toward the shipping public in a responsible manner.

The third area concerns the ICC's failure to regulate rates in a manner which will restrain unreasonable and discriminatory, as well as predatory, pricing.

THE COMMON-CARRIER DUTY TO SERVE

Under common law, a common carrier is obliged to serve without discrimination all shippers (or passengers) within the area of its holding out. The common law remains in effect. It was not repealed or replaced by the Motor Carrier Act of 1935 or the Motor Carrier Act of 1980. Since passage of the 1935 Act, the ICC and the courts have measured a common carrier's holding out—its common law duty to serve the public—by the certificates of public convenience and necessity which are the statement of the carrier's lawful authority. In 1970, the ICC affirmed that measure and found that an interstate motor common carrier could not reduce its holding out through restrictive tariffs.[2]

It is essential to recognize that the 1980 Act did nothing to alter the equation between a motor carriers' certificates and its duty to serve the public with an even hand. Section 11101(a) of 49 U.S.C. states:

A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under Chapter 105 of this Title shall provide the transportation or service on reasonable request. In addition, a motor carrier shall provide safe and adequate service, equipment, and facilities.

Section 10922 requires that the grant of a certificate be based on both evidence of the applicant's fitness, willingness, and ability to perform the proposed service and "evidence presented by persons supporting the issuance of the certificate, that the service proposed will serve a useful public purpose, responsive to a public demand or need."

Any doubt that the 1980 Act retained the common carrier's duty to serve fully and fairly all shippers within its certificated authority was laid to rest by Congressman Shuster of Pennsylvania, a member of the House Committee on Public Works and Transportation, when he spoke to the House about the new legislation as floor leader of that bill:

We were very mindful of this problem and for that reason this bill does not go the whole way with regard to deregulation. This bill does provide, and this is an extremely important point, this bill continued to provide for the common carrier obligation. If a common carrier today has a certificate requiring him to provide service to a particular area, be it rural or urban, he has the obligation under this legislation and that obligation continues. That is an important aspect of the legislation before us. (126 *Cong. Rec.* 5351 (1980))

Despite this explicit directive, the ICC, in a January 1981, warned that it was ready to accept limitations on a common carrier's certificate as the measure of the service it was required to provide. In a notice of a rulemaking proceeding,[3] the ICC proposes to allow carriers to limit their duty through advertising tariff publication. The ICC argues that the new Act forces it to issue certificates which are broader in scope than the applicant's "immediately proposed operations." Thus, according to the ICC's reasoning, if the carrier were obligated to provide service throughtout its cerfificated area, it faced potential violations of its common carrier duty for failure to do so. The ICC referred to this alleged conflict between the scope of a carrier's certificate and the scope of its holding out as a "Catch 22 of unusual proportions." Rather than conform the certificate to the public need demonstrated by the carrier applicant, the ICC proposes a solution in direct contravention of the law: It remains then only to disconnect the issue of holding out from the issuance of certificate authority, which requires foremost the designation of an acceptable substitute for the certificate.[4]

In his August 1981 position paper, at page 9, Chairman Taylor summarized his attitude toward the common-carrier duty to serve. He stated:

In oversight hearings held by Congress during June of 1981, the Commission was roundly chastized for its practice of giving motor carriers much greater authority than they had sought. Congress made clear that while it did not want the Commission arbitrarily to restrict grants of authority, it certainly did not want the Commission unilaterally to grant substantially more authority than requested by an applicant or warranted by his supporting evidence. As previously pointed out, Congress made it abundantly clear the common carrier obligation was not to be eliminated or diluted.[5]

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[2] Restrictions on Service by Motor Common Carriers, 111 M.C.C. 151 (1970).

[3] Ex Parte No. 3, MC-77 (Sub-No. 3), Elimination of Certificates as the Measure of Holding Out, 46 Fed. Reg. 8604.

[4] Supra, note 3.

Chairman Taylor went on to cite examples of ICC authority grants which were broader than the authority requestd by the carrier. He then stated, still at page 9:

> These decisions have certainly made it difficult for the Commission to enforce the common carrier obligation—an important cornerstone of the Commission's responsibility to protect the public interest.

MCLA was heartened by those remarks of Chairman Taylor. Unfortunately, he appears to have shifted his position. In a letter of June 24, 1982, Congressman Shuster posed to Chairman Taylor as a followup to his oversight testimony in the House seven questions dealing with the Motor Carrier Act of 1980. The first question was:

> (1) Congress made it clear in enacting the Motor Carrier Act that the common carrier service obligation was to be observed and enforced. What enforcement program is the Commission progressing to assure that motor carriers are meeting their service obligations to the full extent of their authority?

Chairman Taylor's answer was contained in his letter of August 4, 1982, to Congressman Shuster. In essence, Chairman Taylor argues that the ICC need do nothing to enforce the common carrier duty because service levels are satisfactorily high. He refers to the still-pending rulemaking proceeding and now endorses the ICC's position. We do not know what has caused Chairman Taylor to retreat from his unequivocal support of the common-carrier duty. His answer to Congressman Shuster strongly suggests that when the ICC issues its decision in the rulemaking proceeding it will curtail the common-carrier duty.

Even today, the ICC impedes that duty by issuing grants of authority broader than the authority sought by the applicant. This procedure virtually assures that it will be impossible for the applicant to serve, adequately and without prejudice or discrimination, shippers located within the scope of the certificate but beyond the applicant's operating proposal. Congressman Shuster addressed this problem specifically in his second question:

> (2) The Motor Carrier Act requires an applicant to demonstrate that it is fit, willing and able to provide a proposed service. Can you tell my why the Commission persists in requiring carriers to accept certificates substantially broader in scope than the authority they request?
>
> Once the Commission has granted authority to a carrier broader in dimension than demonstrable need for service or a carrier's fitness, do you require that carrier to provide responsive service to the full extent of the authority?

Chairman Taylor's answer begins by assuring Congressman Shuster that the ICC no longer grants authority broader than that sought by the applicant. However, this is not the case, and there are, almost every day, examples of this practice, which other Commissioners readily concede.[6] Chairman Taylor goes on to admit that it is impossible to require a carrier to serve the full scope of its certificate, if the carrier "was compelled to accept authority broader than requested . . ." Thus, we have a problem of the ICC's own creation, coupled with a refusal to deal with that problem.

The answer is straight-forward. This Committee should demand that the ICC grant certificates which are strictly commensurate with the demonstrated public need and that thereafter the ICC strictly enforce the carrier's duty to serve fairly and without discrimination all shippers within the range of that certificate.

Any limitation by the ICC of the common-carrier obligation to serve would violate the Motor Carrier Act of 1980. Chairman Taylor's answer to Congressman Shuster is unsatisfactory. MCLA urges that there should be no diminution of that obligation—through rulemaking or otherwise.

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[5] Id.

[6] Commissioner Heather Gradison publicly condemned this common practice in speeches before ATA conferences on October 18 and 19, 1982. First confirming Commission commitment to freer entry, she then noted that, "however, in some cases, the Commission has granted an applicant more authority than it requested." "I disagree with this," she said. She registered her official opposition to the practice in her dissenting opinion issued this month in Docket No. MC-158286 (Sub-No. 8), M. T. Truck Line, Inc.—Substituted Motor-For-Rail Service, one of many recent cases in which the Commission has elected to grant authority broader than that requested. In one case, Docket No. MC-159474, U.S. Express, Inc., the Commission, on June 24, 1982, unilaterally expanded applicant's request to serve the facilities of one shipper, Ralston Purina, to a nationwide unrestricted grant of general commodity authority to serve the public generally on a non-radial basis.

The pendency of the rulemaking proceeding has not influenced the astonishing rate at which the ICC grants authority. Virtually 100 percent of the applications for motor carrier authority filed with the ICC are approved in whole or in substantial part.[7] Since a large number of these authorities are very broad, the applicants are likely to assume they are free to serve only such portions of them as they choose to serve.

At part of MCLA's 1981 oversight hearings, we stated, quoting Commission sources, that of the more than 7,000 applications which became administratively final during the period July 1, 1980 through March 31, 1981, not one was denied in whole or in part because an opposing carrier had demonstrated a grant would result in harm to existing carriers contrary to the public interest. Despite the fact that thousands of additional applications have been processed by the Commission since March of 1981, the statement is still true. MCLA does not believe Congress intended the Commisison to adopt an entry policy which in reality gives protestants no chance to prove their case. An unequivocal statement by this Committee is needed: the ICC must be instructed to follow sections 11101(a) and 10922 of 49 U.S.C. as plainly written and require both reasonable and nondiscriminatory service throughout the scope of a common carrier's existing authority and a showing of fitness and public need for any new authority granted.

The ICC's current policy to ignore the common carrier duty to serve inevitably results in loss of services to small communities. If carriers are free to pick and choose the freight they are willing to handle and the towns they are willing to serve, the small shippers and out-of-the-way towns will either lose service or pay an exorbitant premium for any service offered. It is anticipated that witnesses for the Teamsters Union will provide a long list of Colorado towns that have been left without any general freight service. The ICC's so-called "study" of small community service suffers from the statistical insignificance of its sample size and from the failure to contact shippers who had been relying on one or more of the dozen or so major LTL general commodity carriers to have shut down those operations since July 1980. That consumer complaints about motor carrier service were allegedly down in 1981 should be of no surprise. The ICC terminated its consumer "hot line" in 1981 and does little or nothing about those complaints that are received.

The courts have already recognized in several instances that the ICC's grants of authority are too liberal. But a case-by-case review in the courts of hundreds of misdirected ICC decisions is a poor substitute—expensive, time-consuming, and impractical—for the ICC doing its job in the first instance. This Committee should see that the common carrier duty is recognized and not diminished by the new Act and that the Act is followed as written not as the Commission might wish it to be.

FIT, WILLING, AND ABLE

The Motor Carrier Act of 1980 modified section 10922 of 49 U.S.C. so that it now requires the ICC to find that an applicant for motor common carrier authority is "fit, willing, and able—(A) to provide the transportation to be authorized by the certificate; and (B) to comply with this subtitle and regulations of the commission." Today, the ICC requires no showing of willingness and only a *pro forma* indication of ability.

In the area of fitness the situation is even more serious. Fitness measures the carrier's responsibility toward the public it serves. A finding of fitness should reflect the carrier's demonstrated capacity to operate in a manner which does not jeopardize the public—financially, from a safety standpoint, or otherwise. The present law requires no less.

Nonetheless, the ICC has issued a series of decisions[8] which eliminate financial fitness as a requirement, thus abandoning a critical element of fitness which the courts and the ICC have demanded since passage of the Motor Carrier Act of 1935.

All the ICC requires of an applicant for new or expanded authority to prove fitness is an absence of safety violations and no showing the applicant is likely to engage in persistent and flagrant violations of the law and the ICC's reglations. In lieu of a showing of financial fitness, the ICC adheres to the dubious economic theory that competition will prove an adequate substitute, because there will be other carriers eager to fill in for a carrier which fails financially.[9] This is small comfort to a shipper whose freight was in the carrier's hands at the time of failure, or which has valid claims for loss or damage pending against the failed carrier.

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[7] Associate Director Richard Lewis of the ICC's Office of Proceedings placed the ICC's entry policy in perspective during a speech to a meeting of the Association of ICC Practitioners on September 14, 1982: Today you have a more difficult time getting a driver's license than an ICC certificate. There has been a lot of talk about what our grant rate is, but I think it is really 100 percent. It seems to me that the only people not getting their rights forgot to sign their name on the form or didn't include their check.

[8] See, e.g., No. MC-135070 (Sub-No. 182), Jay Lines, Inc., extension—General Commodities, Nationwide (September 28, 1981).

The ICC's view of the reality of the marketplace as a panacea for all disruptive effects of its blind deregulatory policy is erroneous. It cannot be assumed another carrier is or will be fit, willing, and able to take the place of a carrier that fails because of inadequate finances or for any other reason. A carrier and the shippers and consignees it serves over the years build up a relationship. It is destroyed when the carrier goes out of business. It is often expensive and difficult for shippers and consignees to find a replacement. With general freight carriers it may be impossible. What new carriers have come in to replace Spector-Red ball, TIME-DC, Johnson Motor Lines, and Wilson Freight? The ICC's attitude ignores the important carrier-shipper relationship and thus ignores a basic need of the shipping public: consistent, dependable motor carrier service.

The ICC also ignores the impact on the carrier employees, who lose their jobs when carriers fail. What will "the marketplace" do for these people? Rather than foisting financially unit carriers on the public—a public which rightfully should be able to assume the carrier's certificate indicates a fitness to serve—the ICC should assure itself of the carrier's financial ability before it finds the carrier fit, willing, and able to provide the proposed service.

The ICC's determination to do away with financial fitness and operational feasibility finds no support in the new Act. In the frequently mentioned 1981 *ATA* case,[10] the Fifth Circuit noted the statement of the House of Representatives that broad policy determinations respecting entry standards "should be made by Congress and should not be left to the discretion of the Commission." [11] The Court pointed out that the new Act eases entry standards, but then stated, unequivocally:

> The statute retains, however, the "traditional test" that a certificate shall be issued "if the Commission finds" that the person is fit, willing, and able to provide the transportation to be authorized by the certificate. The retention of this standard, tested by forty-five years of interpretation, was deliberate. Entry was eased by revising only the "public convenience and necessity" requirement to reduce the burden of proof on persons supporting the application.

The ICC has chosen to obey the Fifth Circuit only in connection with finding a carrier applicant fit to transport household goods and bulk commodities as a prerequisite to granting such authorities. It continues to disregard financial fitness in all cases and operational feasibility in all other areas of motor carrier transportation. The ICC needs another pointed reminder: Congress should reiterate that the Act means what it says. Aggrieved parties before the ICC can ask the courts, in case after case, to reestablish these elements, but where the ICC's error is so patent and so pervasive, adherence to the statute and the intention of Congress is a far better solution. The ICC chooses to construe court decisions—including that in the *ATA* case—as narrowly as possible and to avoid, wherever possible, allowing those decisions to interfere with its predetermined course of rewriting the Act to suit itself.

One of Congressman Shuster's post-oversight hearing questions to Chairman Taylor dealt with financial fitness:

> (7) How can you justify failing to require every applicant for operating authority to demonstrate its financial fitness, especially in difficult economic times such as these? Don't you think that financial data is now critical for the Commission to obtain?

Chairman Taylor has answered that he is concerned about granting authority to carriers known to be financially unfit. On the other hand, he wonders if there is an effective procedure for flagging any but a handful of truly unfit applicants and concludes that it may be best to leave it to protesting carriers to raise the question of fitness. Chairman Taylor's reasoning is faulty. First, the ICC can detect financially unfit carriers if it requires financial data. It is not burdensome to determine if an applicant has the financial resources to implement its proposed operation and to meet its obligations to the shipping public. It should not be forgotten that today the ICC requires no financial information and thus has totally abandoned its responsibility, and also deprived protesting carriers of vital evidence necessary to challenge fitness even if it were to entertain such challenges. Second, Chairman Taylor's statement that present ICC procedure leaves it up to protesting carriers to protest fitness is patently incorrect. The ICC will not entertain the issue of financial fitness, no matter by whom it is raised. Even if it were left up to protestants, the safeguard would be worthless, since almost all applicants are unopposed.

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[9] No. MC-152180 (Sub-No. 2), Container Express, Inc., Extension—Southern United States (September 22, 1981).

[10] American Trucking Ass'ns v. ICC, 659 F.2d 452 (5th Cir. 1981).

[11] H.R. Rep. No. 1069, 96th Cong., 2d Sess. 13 (1980), quoted at 659 F.2d, at 469.

We urge the Committee to act. The ICC should be required to test an applicant's fitness, willingness, and ability. There is no excuse for the ICC's shortcomings in this area.

UNREASONABLE, DISCRIMINATORY, AND PREDATORY PRICING

The ICC ignores the impact of unreasonable, predatory, and discriminatory pricing of motor common carrier services, a trend highlighted in the testimony of the ATA and the Teamsters. The ICC has abandoned its responsibilities in this area, again in favor of what it perceives as market forces.

Under the dual pressures of the recession and the excessive competition fostered by the ICC's implementation of the Motor Carrier Act of 1980, motor common carriers are engaging in a series of new pricing techniques. These include volume discounts, multiple shipment doscounts, shipper allowances, and aggregate-tender discounts. MCLA squarely supports creative pricing as consistent with a competitive system. But such pricing must not be allowed to violate the minimum standards of lawfulness provided in the 1980 Act nor to threaten the financial stability of the motor carrier industry.

Section 10101(a) of the 1980 Act includes as part of the transportation policy of the United States the establishment and maintenance of "reasonable rates for transportation without unreasonable discrimination or unfair or destructive competitive practices." Subsection 10708(d) establishes a zone of rate freedom in which rates are not subject to suspension, investigation, or revision on the grounds of reasonableness. However, the subsection provides: Nothing in this subsection shall limit the Commission's authority to suspend and investigate proposed rates on the basis that such rates may violate the provisions of section 10741 of this title or constitute predatory practices in contravention of the transportation policy set forth in section 10101(a) of this title.

Section 10741, in turn, prohibits discrimination in the pricing of motor carrier services.

The ICC has responded to the flood of price innovations by an "anything goes" policy. It resists laying down guidelines to assist carriers in conforming their pricing practices to the requirements of the 1980 Act. Recently, the ICC denied a petition by a group of motor carriers seeking from the ICC a declaratory order which would set standards to goven freight rate discounts given for volume and aggregate tenders.[12] The petitioners argues that current discount programs violated the standards governing reasonableness, predation, and discrimination.

The ICC refused to provide the requested guidelines on the grounds that a rulemaking proceeding could stifle legitimate competitive pricing and went on to reject the contention that prices not related to cost savings were predatory. The ICC found little likelihood that in today's marketplace carriers would, or could, engage in such pricing: For such a strategy to succeed, sufficient entry barriers must be present to prevent competitors from reentering the market once the predator attempts to raise its price to monopolistic levels. However, as regulatory barriers are reduced, predation by motor carriers becomes uneconomic, since entry costs are so low that a predator could never enjoy its monopoly price. 365 I.C.C., at 714.

We are confident that this philosophy is not what Congress had in mind when it passed the 1980 Act. What the ICC posts is the continual rise and fall of carrier entities as each struggles to claim a share of the market sufficient to allow it to continue operations. This proposition assumes the economic cost of entry will not prevent replacement—an assumption which is not totally valid. The declining volume of freight caused by unfettered competition and the recession vitually assure that carriers will price their services below cost simply to maintain a share of the traffic without regard to future profitability. This survival of the fittest, the big will outlast the small, means shippers in less-favored locations will be bypassed. Yet the ICC is able to say: A new carriers or revitalized incumbents become more efficient, there will be some losers, but the redistribution of market shares is often a necessary component of competition. 365 I.C.C., at 715.

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[12] Ex Parte No. MC-166, Petition for Declaratory Order—Lawfulness of Volume Discount Rates by Moter Common Carriers of Property, 365 I.C.C. 711 (1982). However, in a later decision in the same proceeding, a bare majority of the ICC has called for "comments" on the pricing practices of motor carriers of property. 47 F.R. 49481-2 (1982). Its very failure to indicate an intention to issue standards or guidelines prompted sharp dissenting opinions from several Commissioners.

"Some losers" are the victims of wasteful pricing schemes prompted the lack of ICC oversight and excessive competition.

While the Commission obviously referred only to carriers, the term "losers" also clearly includes carrier employees and members of the shipping public, possibly the public in general. The level of demand for service and the type of service required have a great deal to do with whether the termination of an existing service will be replaced by a new entrant. Wherever such service is not replaced, individual members of the public, including possibly whole communities, will be among the "losers." Further, if the process condoned and prompted by the Commission leads to the high degree of concentration in motor carrier transportation which most economists seem to expect, the public in general must be considered a "loser."

The danger of rampant rate-cutting was cited by Congressman Shuster in his question to Chairman Taylor. He stated:

> (5) Our transportation policy specifically condemns discrimination and destructive competitive practices. With reports of broadscale ratecutting rampant in the industry, will the Commission hold public hearings to determine whether destructive predatory practices are at work? Frankly, some of the information I have seen supports this contention and I think such public forum would be beneficial.

Chairman Taylor answers candidly that in the petition case (supra, note 8) he voted to consider the issue of discount rates, but that he was in the minority. This Committee should support Chairman Taylor and insist not only that the issue be heard, but that guidelines and standards be established. The financial condition of the industry as a whole requires immediate attention, a specific responsibility of the ICC under the Act.

CONCLUSION

In this statement we have looked at three areas—the common-carrier obligation, the fitness, willingness, and ability of carrier applicants, and pricing—in which we contend the ICC has not properly carried out either the letter or the intent of the Motor Carrier Act of 1980. This oversight hearing provides a forum to address and redress these problems. As motor-carrier lawyers we would be remiss in not bringing these matters to the Committee's attention. We are confident that the Committee will take the steps necessary to correct the situation.

ATTACHMENT

REGULATED MOTOR CARRIERS, NOT LISTED IN ATA TESTIMONY THAT HAVE ENTERED BANKRUPTCY OR TERMINATED OPERATIONS SINCE JULY 1, 1980

American Cargo Exp. (Denver, CO).
American Security Van Lines (Atlanta, GA).
Arkansas Travelers (Texarkana, AR).
Arlan Tpn. (formerly Brannan Sys.) (LA).
Atlas Freight Lines (Santa Fe Springs, CA).
Avonmore Fast Freight (PA).
Bay Motor Express (Mahwah, NJ).
Bowling Green Exp. (Bowling Green KY).
Brockton Motor Exp. (Brockton, MA).
M. Bruenger & Co. (Wichita, KS).
L. Bryan a/b/a/ Bryan Trkg. (Morrow, GA).
Bulk Transport (Prairieville, LA).
Joseph Callavinni Leasing (PA).
Caravan Refrig. Cargo (Dallas, TX).
Caudell Tpn. (Atlanta, GA).
Celeryville Tpn. (Chattanooga, TN).
C&R Truck Lines (Memphis, TN).
Container Transit (Milwaukee, WI).
D&L Express (KS).
Dearborn's Motor Exp. (Boston, MA).
Dixie West Exp. Inc. (Petal, MS).
East Texas Cartage Co. (Tyler, TX).
Eggleston Transportation.
E.L.M. Trucking Co. (Opelika, AL).
Feldman's Express, Inc. (MA).
Foothills Express.
Ford Truck Line (Memphis, TN).
Glover Trucking Corp. (Suffolk, VA).

Graves Truck Line (Salina, KS).
Gringeri Bros. Transp. (MA).
Hagwood Enterprises (Birmingham, AL.).
H&M Cartage (Columbus, OH).
Harper Truckline (Paducah, KY).
Hartley Trucking (OH).
Heavy Hauling (Salina, KS).
Houston Frtwys. (Houston, TX).
Hughs Refrig. (FL).
J. W. Humbert (Green Springs, OH).
Indiana Refrig. Tpt. (Muncie, IN).
Tom Inman Trucking (Tulsa, OK).
Ivory Van Lines (Ft. Worth, TX).
Johnson Truck Lines (Osborne, KS).
Lakeshore Motor Freight (Girard, OH).
Lakeshore Motor Tranist (IL).
Laughlin Lines (NV).
Long's Express (Richmond, VA).
Magnolia Truckline (Memphis, TN).
Maumee Equipment (Maumee, OH).
Mercer Motor Freight (Trenton, NJ).
Midwestern Plastics & Chemicals (Grand Prairie, TX).
C. F. Monk & Sons (PA).
Morash the Mover (Worchester, MA).
W. T. Myles (Conley, GA).
National Transportation.
Orleans Express (Chelsea, MA).
Packers Exp. Inc. (Ft. Worth, TX).
Phillips Transfer (Washington, MO).
Pinter Bros.
Prime, Inc. (MO).
Pulaski Highway Exp. (Nashville, TN).
Quirion Transport, Inc. (Quebec, CN).
R-W Service System (Taylor, MI).
Radwin Transfer (PA).
Randall Barber d/b/a/ Randy's Enterp. (Barbersville, KY).
Rio Grande Motor Way (Denver, CO).
Roberts Transp. (CO).
Ross Truck Lines (Kansas City, KS).
Sawyer Tpt. (Chestertown, IN).
Severance Truck Lines (Lake City, FL).
Shawmut Transportation Co. (Braintree, MA).
Sneeker Frt. Lines (Conyers, GA).
Springfield Exp. Inc. (Nashville, TN).
Steuart Frt. Line (Topeka, KS).
Stevens Trucking (NC).
Story, Inc. (Henager, AL).
Tarheel Express (NC).
Taylor Truck Line (Memphis, TN/Charleston, MS).
Tennessee Motor Lines (Nashville, TN).
Texas Continental Exp. (Dallas, TX).
The Santa Fe Trail Transp. (Wichita, KS).
Toody's Express (Cambridge, MA).
Transamerican Van Service (Ft. Worth, TX).
Transport World (NV).
Truck Lease (NC).
Ward Transport (Pueblo, CO).
Warfel Express.
P. C. White Truck Lines (Dothan, AL).
Williamson Delivery Service (Tampa, FL).
Winters Truck Line (Wichita, KS).
D. S. Woodberry (Charlestown, MA).
Paul Yates (AZ).
W. W. Young & Son, Inc.
Youngstown Cartage Co. (Youngstown, OH).
Yuma County Transp. (Yuma, CO).

LAW OFFICES,
GUY H. POSTELL, P.G.,
Atlanta, Ga., February 1, 1983.

Mr. WILLIAM DIEFENDERFER,
Chief Counsel for Senate Commerce Committee,
U.S. Senate, Washington, D.C.

DEAR MR. DIEFENDERFER: I represent Caudell Transport, Inc., of Atlanta, GA. The purpose of this letter is to correct certain information which was given to your Committee through testimony of Mr. Kim Mann on behalf of the Motor Carrier Lawyers Association on December 14, 1982, in which testimony it was stated that my client, Caudell Transport, Inc., had either entered bankruptcy or had terminated operations since July 1, 1980. This testimony was given apparently to support the position taken by the Motor Carrier Lawyers Association in that testimony.

However, in discussing this matter with Mr. Mann, he has been unable to give me the exact source of this information at this time, but, in any event, on behalf of my client, Caudell Transport, Inc., I respectfully request that you please see that the record in this matter is corrected to delete the name of my client as being a carrier that has "entered bankruptcy or terminated operations since July 1, 1980". The name of my client is listed with a group of other carriers in an attached list to the written testimony of Mr. Mann given before your Committee on the above date.

Contrary to the testimony that my client is "bankrupt" or has "terminated operations", Caudell Transport, Inc., had its best year in its 36 year history in 1982. In fact, my client added 31 new offices alone during the year 1982, additional equipment, and experienced a large growth of its motor common carrier operations during 1982. Furthermore, it expects a 51% increase in growth in 1983 over 1982. To let you know the seriousness of this listing as a "bankrupt" or "terminated business", my client's President has received telephone calls from a number of its customers concerned about its financial welfare in light of the information contained in this testimony which its customers received from persons familiar with the contents of this testimony. We have had to write a number of customers regarding this false information.

Attached hereto is a letter we have written to Mr. Augello of the Shippers National Freight Claim Council who distributed this incorrect information to 800 shipper members. Mr. Augello advises that his source of information is the testimony of Mr. Mann before your Committee. Will you please advise me, in the circumstances, that you will undertake to place this letter in the appropriate place to correct this information, or advise me what is necessary to have the incorrect listing of my client as "bankrupt" or "terminated carrier" deleted from this testimony?

I would appreciate hearing from you as soon as possible.

Yours very truly,

GUY H. POSTELL.

Attachment.

CAUDELL TRANSPORT, INC.,
Forest Park, Ga., January 26, 1983.

Mr. WILLIAM J. AUGELLO,
Executive Director/General Counsel,
Shippers National Freight Claim Council, Huntington, N.Y.

DEAR MR. AUGELLO: Thank you for your quick response to my telephone conversation with you last week. I have received copies of your Claim Digest, Volume VIII, No. 95 dated January 3, 1983, and the accompanying list referred to on page 9 of that digest, as well as the additional list which was not specifically referred to in the digest but was headed "Regulated Motor Carriers Not Listed in ATA Testimony That Have Entered Bankruptcy or Terminated Operations Since 7/1/80." I also received the copy of your Special Bulletin dated January 14, 1983, where you indicated that R-W Service System and Caravan Refrigerated Cargo, Inc., had contacted you and informed you that they had not terminated operations or discontinued service.

I hope you can appreciate how much I would like to find out the source of this erroneous information that has now been sent to your 800 members. We have a potentially huge problem whose ramifications could be most devastating to Caudell Transport, Inc. Therefore, we need to nip this in the bud before it has a chance to do further damage to the parties involved.

On your advice, our attorneys have contacted the law firm of Rice, Carpenter & Carraway in Alexandria, Virginia, and advised them of our concern and of the fact that Caudell Transport, Inc., does not fit into any of the three categories outlined in your digest or in the Oversight hearing testimony. Caudell Transport, Inc., has not gone out of business, nor do we intend to go out of business. We have not filed bankruptcy nor do we intend to file bankruptcy. We have not terminated, reduced, or in any way adversely altered our service. In fact, to the contrary, Caudell Transport, Inc., experienced the best year in its 36-year history during 1982 in both revenues and profits. During 1982 we were granted general commodity authority between all points in the 48 contiguous United States. Furthermore, we are now utilizing that authority to the fullest extent possible and plan to continue that course of action. We have opened offices in the following locations:

Albert Lea, Minnesota
Bryan, Ohio
Cincinnati, Ohio
Council Bluffs, Iowa
Effingham, Illinois
Forest Park, Georgia
Haines City, Florida
Indianapolis, Indiana
Kenner, Louisiana
Memphis, Tennessee
Nashville, Tennessee
Paulsboro, New Jersey
Regent, North Dakota
Slidell, Louisiana
Springfield, Missouri
Walcott, Iowa
Boise, Idaho
Chattanooga, Tennessee
Clarksville, Indiana
Des Moines, Iowa
Florence, South Carolina
Gary, Indiana
Indianola, Mississippi
Kansas City, Kansas
Mauldin, South Carolina
Minneapolis, Minnesota
Owensboro, Kentucky
Perry, Georgia
Seville, Ohio
South Holland, Illinois
St. Louis, Missouri

In addition, Caudell Transport, Inc., has already placed in service two of the 20 brand-new 1983 model 45′, 13′6″ refrigerated trailers that we will add to our fleet of 120 refrigerated trailers during the first quarter of 1983.

As you can see, we are a long way from being bankrupt. Among our top ten customers are Kraft, Inc., Stouffer Foods, Inc., Munford Refrigerated Warehouses (MRW), Campbell Soup, Bunge Edible Oil, and Mead Johnson.

As I said earlier, we are pursuing the ultimate source of this list, but in the meantime, we are trying to minimize the adverse effects this might have on our current customers and/or our potentially new customers. I would sincerely appreciate your adding a brief paragraph in your retraction statement to indicate that we have expanded into the general commodity market in the 48 states, have opened new offices, have added equipment, and have just experienced the best year in our 36-year history, and fully anticipate a 51% growth in 1983 over 1982.

Of course, one of the things that concerns me is that some people who read Digest No. 95 and the subsequent Bulletin may not read Digest No. 96. It's going to be difficult and time consuming for us to measure the adverse effects of this unfortunate occurrence, but we believe that a retraction statement in your digest in a conspicuous place as well as a short paragraph of reinforcement would be helpful. It would also be helpful to have a copy of your membership list so we can personally contact these people, particularly those potential customers with whom we may be dealing in our expansion efforts.

Again, I appreciate your cooperation and look forward to receiving a copy of your next Digest or Bulletin.

Yours truly,

THOMAS M. CAUDELL,
President.

P. S. Since dictating this letter, I have received several additional calls, some from our largest customers, who are very concerned about this situation. Under the circumstances, I respectfully request that you address a special letter to all the members of your group who received a copy of your digest containing this erroneous information. My friend and our corporate ICC attorney, Guy H. Postell, is trying to call you right now. Neither he nor I feel that we can wait on the next publication, nor do we want the retraction buried in the normal bulletin where it might be overlooked.

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